Office-Supreme Court, U.S.
FILED
MAY 27 1983
ALEXANDER L. STEVAS,
CLERK

82-1925

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES DEPARTMENT OF STATE AND GEORGE P. SHULTZ, SECRETARY OF STATE, PETITIONERS

v.

THE WASHINGTON POST COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

LEONARD SCHAITMAN
DOUGLAS LETTER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the statutes that authorize the President and the Secretary of State to account confidentially for expenditures out of a special appropriation for "unforeseen emergencies arising in the diplomatic and consular service" are within the scope of Exemption 3 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3), thereby protecting the records of such expenditures from public disclosure.

2. Whether, if these statutes are not within the scope of Exemption 3, records of such expenditures nevertheless may be withheld from public disclosure on the ground that the statutes are part of a separate scheme by which Congress has exercised its authority under the Statement and Account Clause of the Constitution (Art. I, § 9, Cl. 7) to provide standards of public accountability and disclosure in the specific context of government expenditures.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
1. The statutory framework	2
2. The proceedings in this case	7
Reasons for granting the petition	11
Conclusion	24
Appendix A	1a
Appendix B	20a
Appendix C	25a
Appendix D	38a

TABLE OF AUTHORITIES

Cases:

American Jewish Congress v. *Kreps*, 574 F.2d 624	17, 18, 19
Binion v. *Department of Justice*, 695 F.2d 1189	20
Chamberlain v. *Kurtz*, 589 F.2d 827, cert. denied, 444 U.S. 842	17
Chicago & Southern Air Lines, Inc. v. *Waterman Steamship Corp.*, 333 U.S. 103	21
Church of Scientology v. *United States Postal Service*, 633 F.2d 1327	16, 19
Consumer Product Safety Commission v. *GTE Sylvania*, 447 U.S. 102	17
Currie v. *IRS*, No. 81-7984 (11th Cir. May 2, 1983)	17, 22
Dames & Moore v. *Regan*, 453 U.S. 654	21

Cases:—Continued Page

De Laurentiis v. *Haig*, 686 F.2d 192 ..... 16, 17, 18, 19
Department of State v. *Washington Post Co.*, 456 U.S. 595 12
FAA Administrator v. *Robertson*, 422 U.S. 255 ..... 17, 18
FBI v. *Abramson*, No. 80-1735 (May 24, 1982) 12, 20
Founding Church of Scientology, Inc., v. *National Security Agency*, 610 F.2d 824 . 16
Goland v. *CIA*, 607 F.2d 339, cert. denied, 445 U.S. 927 ..... 15, 16
Haig v. *Agee*, 453 U.S. 280 ..... 19, 21
Halperin v. *CIA*, 629 F.2d 144 ..... 3, 8, 16
Harrington v. *Bush*, 553 F.2d 190 3
Illinois v. *Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983) 19
Irons & Sears v. *Dann*, 606 F.2d 1215, cert. denied, 444 U.S. 1075 ..... 16, 19
King v. *IRS*, 688 F.2d 488 ..... 17, 22
Lee Pharmaceuticals v. *Kreps*, 577 F.2d 610, cert. denied, 439 U.S. 1073 ..... 16, 18, 19
Medina-Hincapie v. *Department of State*, 700 F.2d 737 ..... 17, 18, 19
Moody v. *IRS*, 654 F.2d 795 17
National Commission on Law Enforcement v. *CIA*, 576 F.2d 1373 15
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 20
United States v. *Richardson*, 418 U.S. 166 . 2, 22
Zale Corp. v. *IRS*, 481 F. Supp. 486 22

Constitution and statutes:

U.S. Const. Art. I, § 9, Cl. 7 ..... 2, 8

Constitution and statutes:—Continued — Page

Act of July 1, 1790, ch. XXII, Section 1, 1 Stat. 129 3

Act of Feb. 9, 1793, ch. 4, Section 2, 1 Stat. 300 ..... 3, 5

Act of Mar. 3, 1887, ch. 342, 24 Stat. 481 .. 4

Act of Apr. 29, 1926, ch. 195, 44 Stat. 335.. 4

Act of Aug. 1, 1956, ch. 841, Section 4, 70 Stat. 890 4

Budget & Accounting Act of 1921, ch. 18,42 Stat. 20 *et seq.*:
- Section 312, 42 Stat. 25 5
- Section 313, 42 Stat. 26 (31 U.S.C. 54, recodified at 31 U.S.C. 716)..... 5

Central Intelligence Agency Act of 1949, ch. 227, Section 8(b), 63 Stat. 212 50 U.S.C. 403j(b) 16

Freedom of Information Act, 5 U.S.C. (& Supp. V) 552 ..... 2, 7
- 5 U.S.C. 552(a)(4)(B) 7, 23
- 5 U.S.C. 552(b)(1) 21, 23
- 5 U.S.C. 552(b)(3) ..... *passim*
- 5 U.S.C. 552(b)(3)(A) 13
- 5 U.S.C. 552(b)(3)(B)..... 8, 38a-39a

General Accounting Office Act of 1980, Pub. L. No. 96-226, 94 Stat. 311 6

Government in the Sunshine Act, Pub. L. No. 94-409, Section 5(b), 90 Stat. 1247 ... 17

Pub. L. No. 86-36, Section 6, 73 Stat. 64 ... 16

Pub. L. No. 94-350, 90 Stat. 823 20

Pub. L. No. 94-362, 90 Stat. 937-938 ... 4, 13, 42a

Pub. L. No. 95-86, 91 Stat. 419-420 .... 4, 13, 43a

Pub. L. No. 95-105, 91 Stat. 844 20

Pub. L. No. 95-426, 92 Stat. 963 20

Constitution and statutes:—Continued Page

Pub. L. No. 95-431, 92 Stat. 1021-1022 .. 4, 13, 43a
Pub. L. No. 96-304, 94 Stat. 857, 894 4
Pub. L. No. 97-258, Section 1, 96 Stat. 877 . 3
Rev. Stat. 291 (1878 ed.) 3, 4, 5
8 U.S.C. 1202(f) 17
22 U.S.C. 2671 ..... *passim*
22 U.S.C. (Supp. V) 2694 14
26 U.S.C. (& Supp. V) 6103 ..... 17, 22
31 U.S.C. (Supp. V) 54(a) (recodified at 31 U.S.C. 716(a)) 6
31 U.S.C. (Supp. V) 67(f) (recodified at 31 U.S.C. 3524(a)(1)) 6
31 U.S.C. (Supp. V) 67(f)(2) (recodified at 31 U.S.C. 3524(a)(2)) 6
31 U.S.C. 107 (recodified at 31 U.S.C. 3526(e)) ..... *passim*
31 U.S.C. 107 note 5
31 U.S.C. 1029 (recodified at 31 U.S.C. 331(c)) 2
31 U.S.C. 3526(e) 3, 40a
42 U.S.C. 1306(a) 18
50 U.S.C. 403(d)(3) 15
50 U.S.C. 403g 16

Miscellaneous:

124 Cong. Rec. 33251 (1978) 7
126 Cong. Rec. 5913 (1980) 7
126 Cong. Rec. S2062 (daily ed. Feb. 28, 1980) 7

Miscellaneous:—Continued

	Page
General Accounting Office Act of 1979: Hearing Before a Subcomm. of the House Comm. on Government Operations, 96th Cong., 1st Sess. (1979)	7
H.R. Conf. Rep. No. 1044, 66th Cong., 2d Sess. (1920)	6
H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. (1974)	15
H.R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. (1976)	18
H.R. Rep. No. 94-880, 94th Cong., 2d Sess. (1976):	
Pt. I	17
Pt. II	15
H.R. Rep. No. 94-1083, 94th Cong., 2d Sess. (1976)	20
H.R. Rep. No. 95-231, 95th Cong., 1st Sess. (1977)	20
H.R. Rep. No. 95-1160, 95th Cong., 2d Sess. (1978)	20
H.R. Rep. No. 96-425, 96th Cong., 1st Sess. (1979)	7, 23
H.R. Rep. No. 97-561 (Pt. 1), 97th Cong., 2d Sess. (1982)	3
S. Rep. No. 93-854, 93d Cong., 2d Sess. (1974)	15
S. Rep. No. 94-703, 94th Cong., 2d Sess. (1976)	20
S. Rep. No. 95-194, 95th Cong., 1st Sess. (1977)	20
S. Rep. No. 95-842, 95th Cong., 2d Sess. (1978)	20
S. Rep. No. 96-570, 96th Cong., 2d Sess. (1980)	7

In the Supreme Court of the United States

OCTOBER TERM, 1982

No.

UNITED STATES DEPARTMENT OF STATE AND GEORGE P. SHULTZ, SECRETARY OF STATE, PETITIONERS

v.

THE WASHINGTON POST COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States Department of State and the Secretary of State, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-19a) is reported at 685 F.2d 698. The order denying rehearing and the opinion dissenting from the denial of rehearing en banc (App. B, *infra*, 20a-24a) are reported at 685 F.2d 706. The opinion of the district court (App. C, *infra*, 25a-37a) is reported at 501 F. Supp. 1152.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1982. A petition for rehearing was denied on December 28, 1982 (App. B, *infra*, 20a). By order dated March 22, 1983, the Chief Justice extended the time

within which to file a petition for a writ of certiorari to and including May 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in App. D, *infra*, 38a-44a.

STATEMENT

Respondent Washington Post Company brought this action under the Freedom of Information Act, 5 U.S.C. (& Supp. V) 552, to obtain records pertaining to expenditures by the Department of State from a special account that is funded by an annual appropriation for "unforeseen emergencies arising in the diplomatic and consular service." Congress has authorized the Secretary of State to account for such expenditures by certificate if he determines that it would be advisable not to make public the specific uses for which the funds were spent. 22 U.S.C. 2671; 31 U.S.C. 107.

1. *The Statutory Framework*

a. Article I, Section 9, Clause 7 of the United States Constitution provides that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Pursuant to this constitutional mandate, Congress has directed the Secretary of the Treasury to prepare a statement of receipts, expenditures, and balances of the United States Government. 31 U.S.C. 1029, recodified at 31 U.S.C. 331(c) (see note 1, *infra*); see *United States* v. *Richardson*, 418 U.S. 166, 168 (1974).

From the earliest days of the Nation, however, Congress has determined that the national interest requires confidentiality with regard to the expenditure of public funds for certain purposes. See *United States* v. *Richardson*, *supra*, 418 U.S. at 175 & n.7, 178 n.11;

Halperin v. *CIA*, 629 F.2d 144, 159-160 (D.C. Cir. 1980); *Harrington* v. *Bush*, 553 F.2d 190, 195-196 (D.C. Cir. 1977). In a 1790 statute appropriating funds for the conduct of foreign relations, Congress required the President to cause a regular statement and account of such expenditures to be laid before Congress annually. The statute provided that "the President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify * * *." Act of July 1, 1790, ch. XXII, Section 1, 1 Stat. 129.

In Section 2 of the Act of Feb. 9, 1793, ch. 4, 1 Stat. 300, Congress enacted permanent authorization for the accounting for such funds by certificate if the President determined that the expenditures should not be made public. That Act provided that "in all cases" where a sum of money has issued from the Treasury "for the purposes of intercourse or treaty, with foreign nations," the President shall be authorized "to cause the same to be duly settled annually with the accounting officers of the treasury * * * by causing the same to be accounted for, specifically, in all instances, wherein the expenditure thereof may, in his judgment, be made public; and by making a certificate or certificates * * * of the amount of such expenditures, as he may think it advisable not to specify; * * *." 1 Stat. 300. Every such certificate was deemed a "sufficient voucher" for the funds. *Ibid.* This provision was carried forward in Rev. Stat. 291 (1878 ed.) and eventually was codified at 31 U.S.C. 107. See App. D, *infra*, 40a.[1]

---

[1] After the court of appeals rendered its decision, 31 U.S.C. 107 was recodified without substantive change at 31 U.S.C. 3526(e). Pub. L. No. 97-258, Section 1, 96 Stat. 877, 964-965. See H.R.Rep. No. 97-561 (Pt.1), 97th Cong., 2d Sess. 1-3 (1982). In order to maintain consistency with the decisions below, we shall continue to refer to the provision as 31 U.S.C. 107. The other Sections of Title 31 cited in the petition were recodified in 1982 as well; we will cite to both the original and recodified versions of these Sections.

b. Congress also has included in appropriations acts specific authority to account for expenditures in the area of foreign relations by certificate. As early as the Act of Mar. 3, 1887, ch. 342, 24 Stat. 481, Congress appropriated $50,000 "[t]o enable the President to meet unforeseen emergencies arising in the diplomatic and consular service" and for other purposes, to be accounted for pursuant to Rev. Stat. 291. See also, *e.g.*, Act of Apr. 29, 1926, ch. 195, 44 Stat. 335. In 1956, Congress enacted 22 U.S.C. 2671 to grant the Secretary of State permanent authority to account for funds "expended for unforeseen emergencies arising in the diplomatic and consular service in accordance with Rev. Stat. 291 [31 U.S.C. 107]," but only to the extent permitted in the appropriations act providing funds for that purpose (App. D, *infra*, 39a). See Act of Aug. 1, 1956, ch. 841, Section 4, 70 Stat. 890.

Consistent with 22 U.S.C. 2671, Congress has appropriated funds each year to enable the Secretary of State to meet "unforeseen emergencies arising in the diplomatic and consular service," and each year it has specified that such funds are to be expended in accordance with 31 U.S.C. 107. Congress appropriated $2,100,000 for this purpose in the appropriation act for Fiscal Year 1977 and $2,350,000 in the appropriation acts for Fiscal Years 1978 and 1979.[2] In recent years, at least, all expenditures from these special appropriations have been accounted for by certificate, although the nature of some expenditures has been made public. C.A. App. 21, 25-48.[3]

---

[2] Pub. L. No. 94-362, 90 Stat. 937-938; Pub. L. No. 95-86, 91 Stat. 419-420; Pub. L. No. 95-431, 92 Stat. 1021-1022 (App. D, *infra*, 42a-43a). We also have been informed by the Department of State that an additional $1.3 million was allocated to the Emergency Fund for Fiscal Year 1979 from a supplemental appropriation in Pub. L. No. 96-304, 94 Stat. 857,894.

[3] "C.A. App." refers to the Joint Appendix in the court of appeals. Expenditures from the appropriation have been for such uses as: evacuation of government personnel and their dependents and private citizens from other countries in periods of un-

c. For most of the history of the Nation, Congress did not permit even a confidential audit of expenditures that were accounted for by certificate. As noted above, the Act of Feb. 9, 1793 (and, hence, Rev. Stat. 291) authorized the President to cause such funds to be settled with accounting officers of the Treasury by certificate, which was deemed a "sufficient voucher" for the funds.[4] In the Budget and Accounting Act of 1921, ch. 18, Section 312, 42 Stat. 25, Congress directed the General Accounting Office to investigate the receipt and disbursement of public funds. To this end, the Comptroller General and his staff were granted a right of access to records of all departments and establishments of the government containing information regarding their functions and "financial transactions," but this grant of access was expressly made inapplicable to "expenditures made under the provisions of section 291 of the Revised Statutes [31 U.S.C. 107]" (Section 313, 31 U.S.C. 54, recodified at 31 U.S.C. 716). The legislative history of the Budget and Accounting Act of 1921 clearly indicates that this exception was intended to preclude access by the Comptroller General to records con-

---

rest or natural disaster; relief and repatriation loans for destitute citizens abroad; visits to the United States by foreign officials; Presidential delegations to foreign inaugurations, funerals, etc.; official travel abroad by the President, Vice President and Members of Congress; official travel by the Secretary of State; official representational functions; expenses incurred for special overseas representational functions not otherwise covered by an appropriation; investigation of passport and visa fraud; official gifts to foreign dignitaries; and, in 1980 and 1981, certain expenditures in connection with the Iranian hostage situation. C.A. App. 147-148; App. C, *infra*, 35a-37a. Some funds also were spent from the account in connection with the Department's Fine Arts Committee (C. A. App. 145-146).

[4] After the function of settling accounts was transferred to the Comptroller General in 1921, 31 U.S.C. 107 was revised to provide for settlement of accounts by certificate with the General Accounting Office. See 31 U.S.C. 107 note.

cerning "expenditures made under the emergency fund for the Diplomatic and Consular Service." H.R. Conf. Rep. No. 1044, 66th Cong., 2d Sess. 15 (1920).

In the General Accounting Office Act of 1980 (Pub. L. No. 96-226, 94 Stat. 311), Congress for the first time granted the Comptroller General limited access to certain records pertaining to expenditures that may be accounted for by certificate. Congress retained the exception in the general access provision for expenditures made pursuant to the authority in 31 U.S.C. 107. See 31 U.S.C. (Supp. V) 54(a), recodified at 31 U.S.C. 716(a). However, Congress authorized the Comptroller General to audit such expenditures for the limited purpose of determining whether they were actually made and were permitted by law. 31 U.S.C. (Supp. V) 67(f), recodified at 31 U.S.C. 3524(a)(1). At the same time, Congress specified that the results of the audit and any related information, such as underlying documentation, may be released only to the President or the head of the agency concerned. 31 U.S.C. (Supp. V) 67(f)(2), recodified at 31 U.S.C. 3524(a)(2).[5] The legislative history of the 1980 Act confirms Congress's understanding that the monies in the certificated accounts for which it was authorizing a limited audit by GAO—including the account for emergencies in the diplomatic and consular service—contain "confidential funds" that are "made available on a confidential basis" and that the limitation on disclosure of information by the Comptroller General, even to Congress, was intended to strike a balance

[5] In the event of an unresolved discrepancy, a further limited disclosure may be made to the Senate Committee on Governmental Affairs, the House Committee on Government Operations, and the committees of the House and Senate having legislative or appropriation oversight of the expenditure. 31 U.S.C. (Supp. V) 67(f)(2), recodified at 31 U.S.C. 3524(a)(2).

between preserving the confidentiality of the expenditures and ensuring some accountability for them.[6]

2. *The Proceedings In This Case*

a. In October 1979, a reporter employed by respondent Washington Post Company filed a request with the Department of State under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. V) 552, for the ledger sheets and schedules of disbursements and receipts for the preceding three years from the account for unforeseen emergencies in the diplomatic and consular service ("Emergency Fund") (App. A, *infra*, 2a; C.A. App. 9). By letter dated October 29, 1979, the Department denied the request on the ground that those materials are exempt by law from public disclosure under authority of 22 U.S.C. 2671 and 31 U.S.C. 107 (App. A, *infra*, 2a; C.A. App. 10).[7] On March 6, 1980, the Department's Appeals Review Panel sustained the denial, "[b]ased upon the wording of 22 U.S.C. 2671 and 31 U.S.C. 107 and a long history of practice and Congressional understanding that expenditures from funds appropriated under those authorities are confidential unless the President determines that they may be made public" (C. A. App. 16).

b. Respondent then filed this action pursuant to 5 U.S.C. 552(a)(4)(B) in the United States District Court for the District of Columbia to compel disclosure of the

---

[6] S. Rep. No. 96-570, 96th Cong., 2d Sess. 3-4 (1980); H.R. Rep. No. 96-425, 96th Cong., 1st Sess. 3, 25 (1979); 126 Cong. Rec. 5913 (1980) (remarks of Rep. Brooks); 126 Cong. Rec. S2062 (daily ed. Feb. 28, 1980) (remarks of Sen. Percy); 124 Cong. Rec. 33251 (1978) (remarks of Rep. Brooks); *General Accounting Office Act of 1979: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 48, 49, 87, 104 (1979); J.A. 92-94.

[7] The State Department granted the reporter's request for other records pertaining to another account and the Department's Fine Arts Committee (App. A, *infra*, 2a; C.A. App. 10).

records pertaining to the Emergency Fund. The district court rejected the contention that the records could be withheld under Exemption 3(B) of the FOIA, which permits the withholding of matters that are "specifically exempted from disclosure by statute * * *, provided that such statute * * * establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3)(B). The court believed that 22 U.S.C. 2671 and 31 U.S.C. 107 are "too general" in the discretion granted the Secretary and thus do not specify "particular criteria" or "particular types of matter" to be withheld (App. C, *infra*, 28a-29a).

The district court nevertheless sustained the withholding of the material, finding that its conclusion regarding the application of Exemption 3 was in "sharp conflict" with "other actions by Congress indicating its intent, in the exercise of clear constitutional authority, to withhold the very information" at issue (App. C, *infra*, 30a). The court observed that it was "uncontroverted" that Congress, in the exercise of its authority under the Statement and Account Clause of the Constitution (Art. 1, § 9, Cl.7) to "'define reporting requirements for foreign intelligence operations and related expenditures,'" had "throughout history" granted the Executive authority to make such payments without disclosing them publicly and that "the practice of certification by the Secretary of State has long been endorsed by Congress" (App. C, *infra*, 31a-32a, quoting *Halperin* v. *CIA*, *supra*). The district court also noted that Congress has "regularly exercised its oversight authority" over the Emergency Fund and in 1980 had "strengthen[ed]" that oversight by subjecting the Fund to limited audit by the Comptroller General in a manner that "preserves the secrecy of these expenditures" (App. C, *infra*, 33a; see pages 6-7, *supra*).

The district court reasoned that, in order for respondent to prevail in this FOIA suit, the court would have to find that the FOIA "was intended to repeal this long exercised authority by Congress to maintain secrecy in the expenditure of funds affecting the nation's foreign relations, and, in particular, secrecy in expenditures from the Emergency Fund" (App. C, *infra*, 34a). The court found "no indication in any legislative history that FOIA was ever for a moment intended to have any such effect" (*ibid.*). "Indeed," the court explained, "the stringent controls on disclosure included in the recent legislation authorizing GAO audits of the Fund would be meaningless if a FOIA request could compel release of that same information" (*ibid.*). Under these circumstances, the court held that it would "not impute to Congress the intent for such radical disclosures under FOIA, or the abandonment of its constitutional power, and the plenary authority of Congress in this area will be respected" (*ibid.*).

c. The court of appeals reversed (App. A, *infra*, 1a-19a). The court acknowledged the strength of the government's contentions that the provision in 31 U.S.C. 107 for secret accounting "bespeaks an intent of Congress to allow those expenditures to be maintained in absolute secrecy" and that "it would be foolish to account by certificate for expenditures subsequently disclosed under FOIA" (App. A, *infra*, 11a); the court observed that "[t]his may be an appealing argument for FOIA exemption" (*ibid.*). The court of appeals nevertheless was of the view that 22 U.S.C. 2671 and 31 U.S.C. 107 are "too broad" to be accorded Exemption 3 status (App. A, *infra*, 10a).

The court of appeals also rejected the district court's conclusion that the withholding of the requested records should be sustained because Congress did not intend the FOIA to override the longstanding confidentiality of expenditures from the Emergency Fund.

The court of appeals acknowledged that "[o]ther legislation, its history, and powers of Congress underlying it are not to be ignored" (App. A, *infra*, 13a). But it viewed the FOIA as the "definitive word" on disclosure of government information and explained that the other legislation relied upon in this case did not satisfy what it believed to be the "strictures" of Exemption 3 (App. A, *infra*, 14a).[8] In so holding, the court suggested that Congress would have protected the records about the Emergency Fund from disclosure under the FOIA if it had "focused directly" on the problem, and it indicated that it had "substantial reservations" about the wisdom of disclosing the records (App. A, *infra*, 14a). The court concluded, however, that it was without "dispensing power" to repair what may have been an "oversight" by Congress (*ibid.*).

In a concurring opinion, Judge Friedman recognized that 22 U.S.C. 2671 and 31 U.S.C. 107 reflect a policy of secret accounting for expenditures relating to foreign affairs that "is almost as old as the Constitution" and that the 1980 Act providing for GAO audit of unvouchered accounts was intended to maintain that secrecy (App. A, *infra*, 16a). These statutes left "no doubt" in his mind "that if Congress ever had considered whether to permit disclosure under the Freedom of Information Act of material relating to the Emergency Fund, it would not have permitted such disclosure" (*id.* at 18a). But Judge Friedman concluded that Exemption 3 could not be interpreted to support the holding that "Congress would have favored if it had considered the problem" (*ibid.*).

d. The government's petition for rehearing with suggestion for rehearing en banc was denied, with Judges MacKinnon, Bork, and Scalia dissenting (App. B, *infra*,

[8] The court stated that, on remand, the district court could consider whether other FOIA exemptions might apply (App. A, *infra*, 14a).

20a-24a). The dissenting judges, in an opinion by Judge Scalia, maintained that "the effect of the panel decision is to overturn a congressionally approved tradition and practice of confidentiality in foreign affairs matters that is almost two centuries old" and to "make nonsense" of the 1980 legislation that establishes detailed limitations upon access to records about the Emergency Fund (*id.* at 22a). The dissenters observed that the premise of the 1980 Act that the information would not be publicly available "could not be clearer" (*id.* at 23a). In their view, the 1980 Act was more specifically directed to the issue in this case than the legislative history of the 1976 amendment to FOIA Exemption 3, because it addressed disclosure of confidential expenditures in particular, rather than disclosure of government information in general. For these reasons, the dissenters concluded, the 1980 Act "was a factor that demanded attention—not as an isolated phenomenon whose incompatibility with the court's interpretation of Exemption 3 could be marvelled at, but as an essential element of the interpretive process itself" (*id.* at 23a).

REASONS FOR GRANTING THE PETITION

The holding of the court of appeals that the records at issue here may not be withheld under Exemption 3 of the FOIA is inconsistent with a practice nearly as old as the Constitution of maintaining the confidentiality of certain expenditures made in the conduct of the Nation's foreign relations. Congress has repeatedly approved that practice and has specifically provided for the confidential accounting for monies in the Emergency Fund in each year's appropriation act for the Department of State. So complete has been the traditional confidentiality of these expenditures that, until 1980, even the Comptroller General could not examine the records pertaining to the Emergency Fund.

The court of appeals nevertheless held that Congress, in enacting the 1976 amendments to Exemption

3, intended to repeal this long-standing statutory authorization of confidentiality and even prospectively to preempt the post-1976 enactments in which Congress has reaffirmed its intention that the Emergency Fund remain confidential. Nothing in the text or legislative history of Exemption 3 suggests such a startling result. To the contrary, the State Department's withholding of the records under Exemption 3 is fully consistent with the terms and purposes of that Exemption. Indeed, even the court of appeals appeared to agree with the district court that the result it reached under Exemption 3 is contrary to the congressional intent that records of expenditures out of the Emergency Fund remain confidential.

The court of appeals' ruling is inconsistent with recent decisions of this Court that have rejected the District of Columbia Circuit's equally formalistic constructions of other FOIA exemptions (*Department of State* v. *Washington Post Co.*, 456 U.S. 595 (1982); *FBI* v. *Abramson*, No. 80-1735 (May 24, 1982)), and with the decisions of other courts of appeals that have applied Exemption 3 in a manner that is faithful to the congressional intent underlying both that Exemption and the particular withholding statutes involved. In addition, the decision below threatens to undermine the ability of the Department of State to guarantee confidentiality in certain delicate areas of foreign relations and calls into question the traditionally absolute confidentiality of other appropriated funds that are accounted for by certificate. Review by this Court therefore is warranted.

1. Exemption 3 of the FOIA provides that the Act's mandatory disclosure requirements do not apply to matters that are "specifically exempted from disclosure by statute * * *, provided that such statute * * * (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C.

552(b)(3).[9] The statutes at issue here plainly fall within the terms of Exemption 3.

a. The statutes governing access to documents related to the Emergency Fund refer to "types of matters to be withheld" in a manner that is "particular" in a number of respects. Under 22 U.S.C. 2671, the Secretary of State is authorized to make expenditures, "from such amounts as may be specifically appropriated therefor," for "unforeseen emergencies arising in the diplomatic and consular service." Thus, Section 2671 applies only to the limited amount of funds "specifically" earmarked by Congress, and the expenditures of those funds in turn must be consistent with the purpose of the appropriation. The funds are appropriated annually (see page 4, *supra*), so that the records are further particularized by their reference to expenditures for a designated Fiscal Year.

Moreover, the amount appropriated annually for the Emergency Fund is only a very minor portion of the overall budget for the Department of State: In the appropriations acts for Fiscal Years 1977-1979, the three years to which the FOIA request in this case applies, the total amount appropriated by Congress for the Emergency Fund was less than 0.25% of the total amount appropriated for State Department activities.[10] Finally, the statutory authorization in 22 U.S.C. 2671 for certificate accounting pursuant to 31 U.S.C. 107—and, therefore, for withholding from the public—

---

[9] Subpart (A) of Exemption 3 permits the withholding of matters specifically exempted from disclosure by a statute that "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. 552(b)(3)(A). This branch of Exemption 3 is inapplicable here because 31 U.S.C. 107 does permit disclosure in certain circumstances.

[10] See Pub. L. No. 94-362, 90 Stat. 937-942; Pub. L. No. 95-86, 91 Stat. 419-424; Pub. L. No. 95-431, 92 Stat. 1021-1025.

expressly applies only "to the extent" specifically provided in the appropriation act itself. In sum, through the cumulative operation of 31 U.S.C. 107, 22 U.S.C. 2671, and the appropriations process, Congress has quite specifically identified the "particular types of matters to be withheld" from among the full range of State Department documents to which the FOIA otherwise applies.

b. The court of appeals nevertheless found the statutes "too broad" to qualify for Exemption 3 status because the Emergency Fund has been used for what the court believed to be an unduly wide range of purposes (App. A, *infra*, 10a; see also App. C, *infra*, 29a-30a). This analysis is seriously flawed. The Fund serves a supplementary, contingent purpose; it does not sustain on-going programs throughout the Department for which a great many documents might be generated. Moreover, expenditures from the Fund in fact fall into several quite narrow categories: evacuation and relief for United States government personnel and citizens; special diplomatic functions and gestures in the conduct of the Nation's foreign relations (state visits, official and unofficial delegations, gifts to foreign dignitaries, etc.);[11] payment of informers and related expenses in the investigation of passport and visa fraud; and a limited number of other functions. See note 3, *supra*.

The court of appeals also failed to appreciate that because the Fund is expressly reserved for "unforeseen" contingencies in the conduct of foreign relations, Congress realistically could not—and no doubt would not want to—place rigid substantive limitations on its use. Instead, Congress has sought to exercise a measure of

---

[11] Congress has *required* that any money spent by the Secretary for gifts to foreign officials come from the Emergency Fund. 22 U.S.C. (Supp. V) 2694. This may be viewed as a ratification of the use of the Fund for diplomatic purposes of the same general nature, including official travel and visits.

control over the expenditures by placing a limit on the amount of money available, by authorizing certificate accounting on an annual rather than open-ended basis, and by providing since 1980 for a limited confidential audit by the Comptroller General. Congress's practical approach to the matter of accountability for these confidential expenditures does not deprive the relevant statutes of Exemption 3 status.

c. Furthermore, the language of 22 U.S.C. 2671 and the annual appropriations acts is at least as specific as the language of other statutes that have been held to refer to "particular types of matters to be withheld" and thus to qualify under Exemption 3. For example, 50 U.S.C. 403(d)(3) provides that the Director of Central Intelligence "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure"—language that can result in the exemption of records generated throughout the CIA. But despite its breadth, this statute was specifically identified in the legislative history of amendments to the FOIA as being among those to which Exemption 3 applies,[12] and 50 U.S.C. 403(d)(3) consistently has been held to be an Exemption 3 statute on the ground that it refers to "particular types of matters to be withheld." See, *e.g.*, *Goland* v. *CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980); *National Commission on Law Enforcement* v. *CIA*, 576 F.2d 1373, 1376 (9th Cir. 1978); App. A, *infra*, 10a n.8, and cases cited. The statutes involved here apply to a far smaller category of documents than does 50 U.S.C. 403(d)(3), and the reference in those statutes to "unforeseen emergencies arising in the diplomatic and consular service" is no less "particular" than the reference to "intelligence sources and methods" in 50 U.S.C. 403(d)(3). The court

---

[12] H.R. Rep. No. 94-880 (Part II), 94th Cong., 2d Sess. 15 n.2 (1976); H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974); S. Rep. No. 93-854, 93d Cong., 2d Sess. 16 (1974).

of appeals acknowledged that the statutes involved in this case share "common origins and general subject matter" with 50 U.S.C. 403(d)(3) and related CIA statutes (App. A, *infra*, 10a-11a; see generally *Halperin* v. *CIA*, *supra*, 629 F.2d at 158-161), and there accordingly is no basis for concluding that Congress intended that the expenditures at issue here would be entitled to less protection against public disclosure.[13]

Similarly, the statute exempting from disclosure information concerning the "organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency" (Pub. L. No. 86-36, Section 6, 73 Stat. 64) has been held to be an Exemption 3 statute on the ground that it refers to "particular types of matters to be withheld." See *Founding Church of Scientology, Inc.* v. *National Security Agency*, 610 F.2d 824, 827 (D.C. Cir. 1979); cf. *Church of Scientology* v. *United States Postal Service*, 633 F.2d 1327, 1328-1329 (9th Cir. 1980). See also *Goland* v. *CIA*, *supra*, 607 F.2d at 350 (50 U.S.C. 403g). This language, too, has a far broader sweep than do the statutes governing the Emergency Fund. Other statutes permitting withholding of a wide range of documents likewise have been held to refer to sufficiently "particular types of matters to be withheld" for purposes of Exemption 3.[14]

---

[13] Indeed, the Central Intelligence Agency Act of 1949, ch. 227, Section 8, 63 Stat. 212, 50 U.S.C. 403j(b), provides for certificate accounting in a manner that closely parallels 22 U.S.C. 2671 and 31 U.S.C. 107. Under 50 U.S.C. 403j(b), in the case of expenditures "for objects of a confidential, extraordinary, or emergency nature," the expenditures are to be accounted for "solely on the certificate of the Director," which shall be deemed a "sufficient voucher" for the amount certified. See *Halperin* v. *CIA*, *supra*, 629 F.2d at 160-161.

[14] See *Irons & Sears* v. *Dann*, 606 F.2d 1215 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980); *Lee Pharmaceuticals* v.

The court of appeals' holding in this case therefore departs from other decisions that have accorded Exemption 3 status to statutes containing language of comparable or greater breadth.

d. The decision below also is inconsistent with the decisions of other courts recognizing that the text, background, and purposes of the particular withholding statute relied upon must be given considerable weight in determining whether Congress intended to repeal that withholding authority when it amended Exemption 3 in 1976.[15] Congress amended Exemption 3 in response to this Court's decision in *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975), which held that Exemption 3 was intended to preserve *all* preexisting withholding statutes, even those that vested broad discretion to withhold a wide range of documents. Congress sought to eliminate from the coverage of Exemption 3 statutes granting an agency head "*cart blanche* [*sic*] to withhold any information he pleases" (H.R. Rep. No. 94-880 (Pt. I), 94th Cong., 2d Sess. 23 (1976)). See *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 121-122 n.18 (1980). "Congress did not, however, itself undertake to sort

---

Kreps, 577 F.2d 610 (9th Cir. 1978), cert. denied, 439 U.S. 1073 (1979); cf. *De Laurentiis* v. *Haig*, 686 F.2d 192, 194 (3d Cir. 1982) (35 U.S.C. 122: "[a]pplications for patents" and "information concerning the same"); *Medina-Hincapie* v. *Department of State*, 700 F.2d 737, 742-743 (D.C. Cir. 1983); *De Laurentiis* v. *Haig*, *supra* (8 U.S.C. 1202(f): records pertaining to the "issuance or refusal of visas or permits to enter the United States"); *Currie* v. *IRS*, No. 81-7984 (11th Cir. May 2, 1983), slip op. 2751; *King* v. *IRS*, 688 F.2d 488, 496 (7th Cir. 1982); *Moody* v. *IRS*, 654 F.2d 795, 797 & n.4 (D.C. Cir. 1981); *Chamberlain* v. *Kurtz*, 589 F.2d 827 838-839 (5th Cir.), cert. denied, 444 U.S. 842 (1979) (26 U.S.C. (& Supp. V) 6103: tax "return information").

[15] The amendment is contained in Section 5(b) of the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1247.

out those nondisclosure statutes that it comprehended as remaining within the exemption from those that it intended to exclude." *American Jewish Congress* v. *Kreps*, 574 F.2d 624, 628 (D.C. Cir. 1978). Instead, it incorporated general standards in Exemption 3 and left to the courts the task of determining whether any given preexisting nondisclosure statute had effectively been repealed.

Thus, in considering whether a non-disclosure statute qualifies under Exemption 3, as amended, a court's inquiry must be directed to whether Congress intended to require a particular category of documents, previously exempt from disclosure, to be made public on request. We submit that it is inconceivable that Congress, in 1976, intended to mandate public release of the records relating to the Emergency Fund. All of the indicia of legislative intent support the conclusion that Congress "comprehended [the statutes pertaining to the Emergency Fund] as remaining within the exemption" (*American Jewish Congress* v. *Kreps*, *supra*, 574 F.2d at 628).

First, this case raises none of the concerns that led Congress to overrule the decision in *Robertson*. The Emergency Fund statutes do not grant the Secretary of State carte blanche to withhold any records he pleases from among a broad range of materials that may be filed with or generated throughout the Department. Compare *FAA Administrator* v. *Robertson*, *supra*, 422 U.S. at 266; 42 U.S.C. 1306(a), cited with disapproval in H.R. Conf. Rep. 94-1441, 94th Cong., 2d Sess. 25 (1976). See *Medina-Hincapie* v. *Department of State*, *supra*, 700 F.2d at 742-743; *De Laurentiis* v. *Haig*, *supra*, 686 F.2d at 193-194; *American Jewish Congress* v. *Kreps*, *supra*, 574 F.2d at 630-631; *Lee Pharmaceuticals* v. *Kreps*, *supra*, 577 F.2d at 616-617. They focus narrowly on expenditures from a discrete appropriations account.

Second, the courts of appeals have insisted on a clear showing of congressional intent before concluding that longstanding traditions of confidentiality afforded certain information have been abandoned in the name of the more generalized interest in open government embodied in Exemption 3, especially where, as here, disclosure would jeopardize the very success of the governmental function at issue. See *Irons & Sears* v. *Dann*, *supra*, 606 F.2d at 1220-1221; *Lee Pharmaceuticals* v. *Kreps*, *supra*, 577 F.2d at 617. cf. *Illinois* v. *Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983), slip op. 13-14 ("the rule [of grand jury secrecy] is so important, and so deeply-rooted in our traditions, that we will not infer that Congress has [modified it] without affirmatively expressing its intent to do so"). The court below ignored that requirement here.

Third, the courts of appeals uniformly have framed the ultimate determination to be whether the decision to maintain the confidentiality of the information in question may fairly be said to reflect a judgment by Congress, with an appreciation of the dangers inherent in airing the information, rather than an abdication of legislative decision-making in favor of Executive discretion. See *Medina-Hincapie* v. *Department of State*, *supra*, 700 F.2d at 736; *De Laurentiis* v. *Haig*, *supra*, 686 F.2d at 193; *Church of Scientology* v. *United States Postal Service*, *supra*, 633 F.2d at 1330-1331; *Irons & Sears* v. *Dann*, *supra*, 606 F.2d at 1220; *American Jewish Congress* v. *Kreps*, *supra*, 574 F.2d at 628-629. It is clear, as even the court below appeared to concede, that public disclosure of the records at issue in this case would be contrary to a consistent *congressional* judgment that the Secretary must have the authority to keep the expenditures confidential.

We deal here not merely with a longstanding statutory authorization and a uniform practice of confidentiality; in addition, against this background, Con-

gress continued to pass an appropriations act for each of the years in question—at the time of and after the 1976 amendment to Exemption 3—specifically authorizing confidential accounting. See page 4 and note 2, *supra*. See *Haig* v. *Agee*, 453 U.S. 280, 301 (1981). Indeed, in each of those years, Congress focused on the Emergency Fund not once but *twice*, because in each year the appropriation first was authorized by separate legislation.[16] Moreover, as explained above (see pages 6-7), Congress provided in 1980 for a highly confidential and limited GAO audit of the Emergency Fund records that confirms the confidentiality of the expenditures. As Judge Scalia observed, these post-1976 statutes are more specifically directed to the present question than the 1976 legislative history of Exemption 3, "since [they] address[] disclosure of confidential expenditures in particular, rather than disclosure of government information in general" (App. A, *infra*, 23a-24a). The court of appeals' wooden and highly "formalistic reading" of Exemption 3 ignores these unmistakable indicia of legislative intent. *FBI* v. *Abramson*, *supra*, slip op. 15; see *id.* at 9. See also *Binion* v. *Department of Justice*, 695 F.2d 1189, 1194 (9th Cir. 1983).

e. The court of appeals also failed to give weight to the fact that the statutes at issue here concern the President's conduct of foreign relations, an area in which this Court has recognized that Congress "must often accord to the President a degree of discretion and

---

[16] Pub. L. No. 94-350, 90 Stat. 823; Pub. L. No. 95-105, 91 Stat. 844; Pub. L. No. 95-426, 92 Stat. 963. The committee reports on those laws specifically refer to the authorization of appropriations for the Emergency Fund. See S. Rep. No. 94-703, 94th Cong., 2d Sess. 4 (1976); H.R. Rep. No. 94-1083, 94th Cong., 2d Sess. 3 (1976); S. Rep. No. 95-194, 95th Cong., 1st Sess. 7 (1977); H.R. Rep. No. 95-231, 95th Cong., 1st Sess. 5 (1977); S. Rep. No. 95-842, 95th Cong., 2d Sess. 4 (1978); H.R. Rep. No. 95-1160, 95th Cong., 2d Sess. 6 (1978).

freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). The confidential nature of information on which the conduct of diplomatic relations frequently is based, the delicate judgments about the effect of various actions on the Nation's foreign relations, and other factors bearing on the President's role as the sole organ of foreign affairs establish "the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed" (299 U.S. at 321-322). See also *Dames & Moore* v. *Regan*, 453 U.S. 654, 678 (1981); *Haig* v. *Agee*, *supra*, 453 U.S. at 291-292; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109-111 (1948). The court of appeals therefore erred in insisting upon a degree of specificity that Congress has deliberately eschewed in this area. Indeed, Exemption 1 of the FOIA itself reflects the deference and latitude to maintain secrecy traditionally afforded the Executive in such matters even in the face of the countervailing interest in open government. Exemption 1 provides for the withholding of material that is authorized to be kept secret pursuant to Executive Order of the President "in the interest of national defense or foreign policy" (5 U.S.C. 522(b)(1))—a standard framed in quite general terms.

2. Even if the court of appeals were correct that the statutes involved here do not satisfy the usual criteria for Exemption 3 status, the court nevertheless erred in concluding (App. A, *infra*, 11a-15a) that Congress intended the FOIA to supplant the separate statutory scheme, of which these statutes are a part, by which Congress long has exercised its power under the Statement and Account Clause to regulate public disclosure in the specific area of government receipts and expenditures. This Court has noted in this regard the "nearly

two centuries of acceptance of a reading of [the Statement and Account Clause] as vesting in Congress plenary power to spell out the details of precisely when and with what specificity Executive agencies must report the expenditure of appropriated funds and to exempt certain secret activities from comprehensive public reporting." *United States* v. *Richardson*, *supra*, 418 U.S. at 178 n.11.

The Seventh Circuit, in contrast to the decision below, recently has recognized that a separate system of disclosure narrowly focusing on a discrete category of documents must take precedence over the disclosure provisions and exemptions in the FOIA, at least where, as here, Congress has enacted laws after the 1976 amendment to Exemption 3 that provide for the confidentiality of the matters in question. See *King* v. *IRS*, *supra*, 688 F.2d at 488; see also *Zale Corp.* v. *IRS*, 481 F. Supp. 486 (D.D.C. 1979).[17] A contrary result would mean that Congress, in amending Exemption 3 in 1976, intended to accomplish a "prospective pre-emption" of subsequent legislation that clearly was intended to permit the withholding of government information (App. A, *infra*, 23a, quoting *King* v. *IRS*, *supra*, 688 F.2d at 488, and *Zale Corp.* v. *IRS*, *supra*, 481 F. Supp. at 489). The court of appeals should have been especially reluctant to conclude that Congress intended that result in this case, because the separate system of disclosure and exemption is rooted in the Constitution itself.

3. The decision of the court of appeals threatens to undermine the ability of the Department of State to assure confidentiality in certain delicate areas of diplo-

---

[17] The Eleventh Circuit also recently indicated approval of this approach with respect to 26 U.S.C. (& Supp. V) 6103, at issue in *King* and *Zale*, but declined to follow that approach because it was bound by prior circuit precedent that made that course inappropriate. See *Currie* v. *IRS*, *supra* note 14, slip op. 2751-2752.

matic relations. Disclosure of certain of the information at issue could expose the details or dimensions of secret activities; it could also lead to comparisons in the amount of expenditures made with respect to different nations or their heads of state that could embarrass those nations or leaders and thereby cause damage to our relations with other countries (C.A. App. 25-26, 30, 44, 47-48). Although some of the records might qualify for withholding under other exemptions, the judges dissenting from the denial of rehearing en banc correctly observed that "only Exemption 3 can conceivably cover the entire category of material that the 1980 statute so scrupulously withholds from all government officials except a designated few" (App. A, *infra*, 22a n.*). Moreover, the decision of the court of appeals calls into question the traditionally absolute confidentiality of other funds that Congress also has authorized to be accounted for by the certificate of a responsible Executive official. See H.R. Rep. No. 96-425, *supra*, at 25-26 (listing such accounts).

Because every withholding of records under the FOIA may be challenged in the District of Columbia Circuit (5 U.S.C. 552(a)(4)(B)), the government cannot easily afford to await further developments in other circuits on the specific question of the application of Exemption 3 to the records pertaining to the Emergency Fund or other certificated accounts. Review by this Court therefore is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX. E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
LEONARD SCHAITMAN
DOUGLAS LETTER
Attorneys

MAY 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 80-2469

Argued Sept. 17, 1981
Decided Aug. 13, 1982

THE WASHINGTON POST COMPANY, APPELLANT

v.

UNITED STATES DEPARTMENT OF STATE, ET AL., APPELLEES

Opinion on Denial of Rehearing En Banc Dec. 28, 1982

Before GINSBURG, Circuit Judge, McGOWAN, Senior Circuit Judge, and FRIEDMAN*, Chief Judge of the United States Court of Claims.

Opinion for the Court filed by Senior Circuit Judge McGOWAN.

Separate concurring opinion filed by Chief Judge FRIEDMAN.

McGOWAN, Senior Circuit Judge:

This appeal in a Freedom of Information Act (FOIA) case presents the question of whether the District Court, having rejected the Government's contention that two pre-FOIA statutes qualified as a statutory prohibition of disclosure under Exemption 3 of FOIA, properly went on to hold that there could be inferred from such statutes and their historical context an intention by Congress that disclosure should not be made despite the unavailability of any FOIA exemption.

In its appeal to this court, the Government's presentation is largely confined to a reassertion of the only contention made by it in the District Court, namely,

*Sitting by designation pursuant to 28 U.S.C. §293(a).

that Exemption 3 applied. Alternatively, it relies upon the ground of decision volunteered by the District Court. We affirm the District Court's ruling in the former regard, but not in the latter.

I

By letter dated October 3, 1979, appellant *Washington Post*, through its reporter Ronald Kessler, submitted a FOIA request to the Department of State seeking access to all materials pertaining to the Department's Fine Arts Committee. J.A. at 8. Appellant subsequently supplemented that request, seeking as well the ledger sheets and schedules of disbursements and receipts with respect to account 19X8822 and the Secretary of State's fund for "Emergencies in the Diplomatic and Consular Service" (Emergency Fund). J.A. at 9. The supplemental request sought only such records as pertained to the previous three years.

Appellant's request was denied only with respect to materials relating to the Emergency Fund. The *Post* was so notified by letter dated October 29, 1979, which cited 22 U.S.C. § 2671 (1976) and 31 U.S.C. § 107 (1976) as the bases for the denial. J.A. 10. The *Post* challenged the denial before the Appeals Review Panel of the State Department, which affirmed the decision to withhold. The Panel indicated that the two previously cited statutes operated to provide an exemption from disclosure under FOIA for material relating to the Emergency Fund by reference to Exemption 3. 5 U.S.C. § 552(b)(3) (1976). J.A. at 16. The *Post* challenged this determination in a suit filed in the District Court.

In the District Court, the Department of State filed a motion for summary judgment following some preliminary discovery. J.A. at 53. The *Post* cross-moved for summary judgment and partial summary judgment, claiming with regard to the latter that issues of fact remained to be decided. J.A. at 72, 76. On November 24,

1980, the District Court filed a Memorandum and Order granting the Department's motion and denying those of the *Post*. 501 F. Supp. 1152 (D.D.C. 1980).

The District Court relied, however, not on Exemption 3 or, indeed, on any of the FOIA exemptions. In fact, it ruled explicitly, contrary to the Government's contention, that Exemption 3 was not applicable. It turned instead to Congress's long-exercised power, under the Statement and Account Clause of the Constitution,[1] to maintain secrecy in foreign affairs expenditures in general, and in the Emergency Fund in particular. The court detailed a lengthy history of delegation by Congress to the Executive of the authority to make foreign affairs payments without disclosing them. In the case of the Emergency Fund, the court found evidence that Congress, in its regular oversight over the fund, and particularly in passing, after FOIA, legislation subjecting Emergency Fund expenditures to limited audit by the General Accounting Office, had delegated such authority. 501 F. Supp. at 1156-57. The court suggested that such legislation would be rendered meaningless if material accounted for secretly were subject to disclosure under FOIA. It concluded that:

> [u]nder these circumstances, the Court will not impute to Congress the intent for such radical disclosures under FOIA, or the abandonment of its constitutional power, and the plenary authority of Congress in this area will be respected.

501 F. Supp. at 1157. It is from this holding that the *Washington Post* appeals.

[1] Article I, §9, cl. 7 provides:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

II

The Freedom of Information Act embodies, in the contemplation of Congress, "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language. . . ." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). The Act pursues this result by combining a general command of broad disclosure, 5 U.S.C. § 552(a) (1976), with nine specific exemptions. 5 U.S.C. § 552(b) (1976). "It is a commonplace that the former is to be generously construed while the latter are narrowly circumscribed." *Irons and Sears v. Dann*, 606 F.2d 1215, 1219 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075, 100 S.Ct. 1021, 62 L.Ed.2d 757 (1980). *See generally Baldrige v. Shapiro*, ___ U.S. ___, 102 S.Ct. 1103, 1108, 71 L.Ed.2d 199 (1982). In the absence of a statutory exemption, the court has no general equitable power to prevent disclosure of documents. *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971). As the Supreme Court explained in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978):

> Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests. But unless the requested material falls within one of these nine statutory exemptions, FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public.

Id. at 220-21, 98 S.Ct. at 2316-2317 (footnote omitted). *See also Department of the Air Force v. Rose*, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 1598-1599, 48 L.Ed.2d 11 (1976); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136-37, 95 S.Ct. 1504, 1509-1510, 44 L.Ed.2d 29 (1975); *EPA v. Mink*, 410 U.S. 73, 79-80, 93 S.Ct. 827, 832-833, 35 L.Ed.2d 119 (1973).

The exemption claimed by the Department to be applicable in this case is Exemption 3, which excludes from the coverage of FOIA, matters:

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3) (1976). In particular, the Department relies on the second proviso of the exemption. Originally this exemption protected only material "specifically exempted from disclosure by statute." In 1976, however, Congress amended it for the specific purpose of closing the gap created by an expansive reading of the exemption by the Supreme Court. Pub.L. No. 94-409, 90 Stat. 1247 (1976). *See* H.R. Rep. No. 880 (Part I), 94th Cong., 2d Sess. 23 (1976); H.R. Rep. No. 1441, 94th Cong., 2d Sess. 25 (1976); (Conference Report), U.S. Code Cong. & Admin. News 1976, p. 2183.

In *Administrator, FAA v. Robertson*, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975), the Supreme Court had suggested that, in promulgating FOIA, Congress's intent "was to permit the numerous laws then extant allowing confidentiality to stand[.]" *Id.* at 266, 95 S.Ct. at 2148. Consequently, the Court found a portion of the Federal Aviation Act of 1958, 49 U.S.C. § 1504, which permitted nondisclosure when "a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public" to be a statute qualifying under Exemption 3. In modifying Exemption 3 to overrule such a result, Congress clearly indicated that its intent was to institute a sweeping change in the direction of thorough-going administrative disclosure.

Some statutes have, nevertheless, passed muster with Congress or the courts under the revised Exemption 3. Statutes suggested in the legislative history of that revision as qualifying under Exemption 3 include 42 U.S.C. §§ 2000e-5(b), 8(e) (1976),[2] 2 U.S.C. § 437g(a)(3) (1976),[3] and 49 U.S.C. § 1461 (1976).[4] The courts have added to this list § 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1) (1975),[5] 50

---

[2] *See* H.R. Rep. No. 880 (Part I), 94th Cong., 2d Sess. 23 (1976). Section 5(b) provides in pertinent part that "[c]harges [alleging unlawful employment practices] shall not be made public by the [Equal Employment Opportunity] Commission." Section 8(e) provides that

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information.

[3] *See* H.R. Rep. No. 880 (Part I), 94th Cong., 2d Sess. 23 (1976). The section then provided in subsection (B) that

> Any notification or investigation made under paragraph (2) [pertaining to alleged Federal Election Campaign Act violations] shall not be made public by the [Federal Election] Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

[4] *See* H.R. Rep. No. 880 (Part I), 94th Cong., 2d Sess, 23 (1976). The section provided, in part, that "all decisions [dealing with air carrier certificates or permits] by the [Civil Aeronautics] Board shall be submitted to the President before publication thereof." 49 U.S.C. §1461(a) (1976).

[5] *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 100 S.Ct. 2051, 64 L. Ed.2d 766 (1980). The section provides in pertinent part that

> The [Consumer Product Safety] Commission shall take reasonable steps to assure, prior to . . . public disclosure [of information obtained or to be disclosed by it pursuant to this chapter], that information from which the identity of [the] manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the

U.S.C. §§ 403(d)(3) and 403g (1976),[6] and 13 U.S.C. §§ 8(b) and 9(a) (1976),[7] among others. They have excluded statutes that, like the one at issue in *Robertson*, permit or discourage disclosure at the discretion of the administrator, limited only by the national or public interest. *See, e.g., American Jewish Congress v. Kreps*, 574 F.2d 624 (D.C. Cir. 1978) (statute prohibiting publication of information "unless the [administrator] determines that the withholding thereof is contrary to the national interest" not within Exemption 3).

It is clear from the first proviso of Exemption 3, 5 U.S.C. § 552(b)(3)(A), which deals with statutes leaving no discretion to the agency, that some administrative discretion will not remove a statute automatically

---

circumstances and reasonably related to effectuating the purposes of this chapte [*sic*].

[6] *See* cases cited in footnote 8 *infra*. Both sections are quoted at pages 703-704 *infra*.

[7] *See Baldrige v. Shapiro*, ____ U.S. ____, 102 S.Ct. 1103, 71 L.Ed.2d 199 (1982). Section 8(b) provides in part that, subject to particular limitations,

> the Secretary [of Commerce] may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent. . . .

Section 9(a) provides in part that

> [n]either the Secretary [of Commerce], nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports

from the purview of the second proviso. To hold otherwise would render that proviso meaningless. Nevertheless, the legislative history of the Act and its amendments, and subsequent judicial glosses, indicate that to fall within the second proviso of Exemption 3, a statute must set forth more than a standard placing the entire burden of decisionmaking on an administrative officer, checked only by amorphous reference to the public interest:

> Subsection (B) does leave room for administrative discretion in two carefully defined situations, but its unmistakable thrust . . . is to assure that basic policy decisions on governmental secrecy be made by the Legislative rather than the Executive branch.

American Jewish Congress v. Kreps, 574 F.2d 624, 628 (D.C. Cir. 1978). *See also Irons & Sears v. Dann*, 606 F.2d 1215, 1219-20 (D.C.Cir. 1979), *cert. denied*, 444 U.S. 1075, 100 S.Ct. 1021, 62 L.Ed.2d 757 (1980).

III

In the instant case, the statutes claimed by the Government to fall within Exemption 3 are 22 U.S.C. § 2671 (1976) and 31 U.S.C. § 107 (1976). The former provides, in pertinent part, that

> The Secretary of State is authorized to—
>
> (a) make expenditures, from such amounts as may be specifically appropriated therefor, for unforeseen emergencies arising in the diplomatic and consular service and, to the extent authorized in appropriations Acts, funds expended for such purposes may be accounted for in accordance with section 107 of title 31
>
> . . . .

31 U.S.C. § 107 provides that

> Whenever any sum of money has been or shall be issued, from the Treasury, for the purposes of intercourse or treaty with foreign nations, in pursu-

> ance of any law, the President is authorized to cause the same to be duly settled annually with the General Accounting Office, by causing the same to be accounted for, specifically, if the expenditure may, in his judgment, be made public; and by making or causing the Secretary of State to make a certificate of the amount of such expenditure, as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sum therein expressed to have been expended.

Thus, the sections together contemplate emergency foreign affairs expenditures for which the President or Secretary of State may account in secrecy. Appellee Department of State, here as in the District Court, asserts that these statutes, taken alone or in their historical and legislative context, provide standards of the specificity requisite to qualify for Exemption 3 status.

The Government points, as an indication of particular matters to be withheld, to the phrase in 22 U.S.C. § 2671, "emergencies arising in the diplomatic and consular service." Only such material, so it is said, as relates to these, and as relates to money specifically designated and appropriated by Congress, would qualify for FOIA exemption. As the District Court itself noted, however, this standard, to the extent that the phrase constitutes one, is simply too broad:

> Every statute necessarily will refer, with more or less specificity, to 'particular types of matter.' ... To permit the fact that all payments were made from the Emergency Fund to be by itself a sufficient standard to satisfy the 'particular types of matter to be withheld' requirement would rob the standard of any meaning.

501 F.Supp. at 1155. In denying Exemption 3 status to § 7(c) of the Export Administration Act of 1969, 50 U.S.C. App. § 2406(c) (1970), for example, this court intimated that the referent of the statute's definition of

"particular types of matter" was simply too vast for the statute to qualify, despite some designation of matters of particular types. *American Jewish Congress v. Kreps*, 574 F.2d 624, 630-31 (D.C. Cir. 1978).

The statutes, as interpreted by the agency, are also, in the view of the District Court, too broad. 22 U.S.C. § 2671 might have met the Exemption 3 test were the expenditures incurred pursuant to it basically of one narrow type. But the Government's submission to the District Court indicates a vast array of matters falling within the "emergencies" rubric, ranging from Fine Arts Committee expenditures to travel expenditures for official delegations. 501 F. Supp. at 1158-59. This range does not become particular merely because Congress may have had some opportunity for overseeing it. The statute itself is, therefore, too broad to qualify for Exemption 3 withholding, even as construed by the Department.

Appellee further argues that the relationship between 22 U.S.C. § 2671 and 31 U.S.C. § 107, and other statutes, particularly 50 U.S.C. § 403(d)(3) (1976), suggests a contrary result. The legislative history of the amendment of Exemption 3 indicates that Congress contemplated continued Exemption 3 status for § 403(d)(3). H.R. Rep. No. 880 (Part II), 94th Cong., 2d Sess. 15 n.2 (1976). *Cf.* H.R. Rep. No. 1380, 93d Cong., 2d Sess. 12 (1974); S. Rep. No. 854, 93d Cong., 2d Sess. 16 (1974) (same result under earlier formulation of Exemption 3). Courts also have found that § 403(d)(3) and a related section, 50 U.S.C. § 403g (1976), fall within Exemption 3.[8]

[8] *See Halperin v. CIA*, 629 F.2d 144 (D.C.Cir. 1980); *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980); *Ray v. Turner*, 587 F.2d 1187 (D.C. Cir. 1978); *Baker v. CIA*, 580 F.2d 664 (D.C. Cir. 1978); *Weissman v. CIA*, 565 F.2d 692 (D.C. Cir. 1977); *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). *See also*

These statutes, however, share little but common origins and general subject matter. 50 U.S.C. § 403g, which relates to the Central Intelligence Agency, provides that "the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency" shall be protected from disclosure. This specific designation of materials, combined with the section 403(d)(3) mandate "[t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure," provides a vastly more precise blueprint than do the two open-ended statutes relied upon in this case.

Appellee also contends that the privilege of secret accounting for expenditures provided the President and Secretary of State by 31 U.S.C. § 107 bespeaks an intent of Congress to allow those expenditures to be maintained in absolute secrecy, claiming that it would be foolish to account by certificate for expenditures subsequently disclosed under FOIA. This may be an appealing argument for FOIA exemption; it does not, however, establish the qualification of the statute under Exemption 3. Any properly classified material could, for example, have been withheld pursuant to the first exemption, set forth at 5 U.S.C. § 552(b)(1).

IV

Upon concluding that the disputed material did not fall within the protection of Exemption 3—the only exemption claimed for it—the District Court went on to state that for the *Post*

> to prevail in this case, the Court would be required to find that the Freedom of Information Act was

---

Note, *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act*, 76 Colum. L. Rev. 1029, 1044 n.91 (1976) (discussing § 403g). *Cf.* J. T. O'Reilly, Federal Information Disclosure ¶ 13.07 (1977) (implying exemption under § 552(b)(3)(A)).

> intended to repeal [the] long-exercised authority by Congress to maintain secrecy in the expenditure of funds affecting the nation's foreign relations, and, in particular, secrecy in expenditures from the Emergency Fund.

501 F. Supp. at 1157. This, the court would not find. For its conclusion that Congress had intended to allow no disclosure, it relied on this history as well as on the purported limited displacement of FOIA evidenced by certain more recent legislation. *See* Pub. L. No. 96-226, 94 Stat. 311 (1980); 501 F. Supp. at 1157 & n.7.[9]

It is uncontroverted that Congress has the power to maintain secrecy and, indeed, that it has frequently exercised it. The question before us, however, is whether, in the face of Congress's strong mandate of disclosure expressed in FOIA, we may conclude that it intended

---

[9] This conclusion was presaged in part by the District Court's comment to appellant's counsel, at the hearing on the cross-motions for summary judgment, that

> You are in a traditional historical area where no one would contemplate such disclosure except the Washington Post.... [Y]ou are asking for a broad opening-up of the entire traditional history of confidentiality, going to the heart of the President's conduct of key aspects of foreign affairs.

Transcript at 20-21.

The second part of the District Court's conclusion, relying upon recent Congressional action, is not unlike its reasoning in another FOIA case, *Zale Corp. v. United States Internal Revenue Service*, 481 F. Supp. 486 (D.D.C. 1979). *Zale* suggests as well that Congressional action, and particularly post-FOIA legislation, may override FOIA, at least in limited circumstances. While we intimate no opinion on the *Zale* holding, we note that in that case, as in a similar case, *Anheuser-Busch, Inc. v. Internal Revenue Service*, 493 F. Supp. 549 (D.D.C. 1980), the District Court specifically held that Exemption 3 would, in any event, have prevented disclosure of the disputed material. In the instant case, the holding of the District Court was expressly to the contrary.

to exercise that power to prevent disclosure in this instance.

The Congressional debate following the *Robertson* decision indicates that it did not. In *Robertson*, the Supreme Court declined to interpret FOIA as though it had (1) repealed "by implication all existing statutes 'which restrict public access to specific Government records,'" 422 U.S. at 265, 95 S.Ct. at 2147, quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), U.S. Code Cong. & Admin. News 1966, p. 2418, and (2) intended to reassess "every delegation of authority to withhold information which it had made before the passage of this legislation. . . ." *Id.* The Court, instead, asserted its purpose to interpret FOIA, to the extent possible, consistently with such previous legislation.

The subsequent—and professedly responsive—action by Congress to amend Exemption 3 to "eliminate the gap created in the Freedom of Information Act by the *Robertson* case," H.R. Rep. No. 880 (Part I), 94th Cong., 2d Sess. 23 (1976), U.S. Code Cong. & Admin. News 1976, p. 2205, emphatically demonstrated Congress's intent that FOIA must be taken to be something more than an ordinary statute, namely, the definitive word on disclosure of the information in the Government's possession covered by it. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Other legislation, its history, and powers of Congress underlying it are not to be ignored, but are to be taken as justifying refusal to disclose only when they meet the strictures of one of the specific exemptions included in FOIA. Consequently, when the District Court went beyond its determination that the material did not fall within the relevant FOIA exemption, and asked whether Congress had the power to prevent disclosure and had in fact exercised such power in the past, it asked a question an affirmative answer to which could not foreclose appellant's right to disclosure.

In so holding, we are not to be understood as implying that there is no FOIA exemption that could conceivably encompass the disputed material. Rather, we assert only, as did the District Court, that Exemption 3—the only FOIA exemption claimed by the Department of State in this court—does not apply to this material; and that, in the absence of any other applicable exemption, the courts lack the power to bar disclosure permanently. On remand, the District Court may consider the applicability of any other FOIA exemptions, whether raised by the Department of State or by the court itself, *sua sponte*.[10]

It is possible for a reviewing court to have substantial reservations about the wisdom of public disclosure of various kinds of materials which Congress has, wittingly or unwittingly, in terms brought within the broad reach of FOIA. It is not unlikely that there are circumstances in which, if Congressional attention were to be focused directly upon a disclosure mandated by FOIA, it would elect to narrow the scope of that statute, just as its focus upon the disclosure denied by the Supreme Court in *Robertson* caused it explicitly to broaden the Act. But, until Congress acts in response to such a stimulus, there is no dispensing power presently vested in the courts to repair what arguably may have been an oversight. That can only be done by Congress itself. The most that a court could do in such a situation would be, in response to a strong showing of imminent and demonstrable danger to a compelling na-

---

[10] Cases in which courts have suggested or raised the applicability of FOIA exemptions *sua sponte* include *Greentree v. United States Customs Service*, 515 F. Supp. 1145 (D.D.C. 1981), *reversed and remanded for consideration of other FOIA exemptions*; 674 F.2d 74 (D.C. Cir. 1982); *Sims v. CIA*, 479 F. Supp. 84, 88 (D.D.C. 1979), *vacated and remanded on other grounds*, 642 F.2d 562 (D.C.Cir. 1980); *Dunaway v. Webster*, 519 F. Supp. 1059, 1071-73 (N.D.Cal. 1981).

tional interest, to stay its judgment for a time to give Congress an opportunity to correct its oversight, if such it be.[11] *See, e.g.*, the judgment order of this court in *American Banks Association and Tioga State Bank v. Connell*, (D.C.Cir.1979).

For the foregoing reasons, we (1) reverse the grant of summary judgment by the District Court to appellee Department of State, and (2) affirm the denial of appellant *Post's* motion for summary judgment, without prejudice to a second motion by the *Post* should the Government be unable to establish the applicability of any other exemptions.

Our remand of this case to the District Court shall, however, be without prejudice to an application by the Department of State, if it should so choose, to the District Court for a stay of the judgment mandated by this opinion, for the purpose and upon the showing hereinabove indicated. Any such stay shall be entered only after such proceedings as the District Court may determine to be necessary for the exploration of the dangers to the national interest asserted by the Department of State, and upon appropriate findings by the District Court. Such a stay should be of fixed duration and only for such period of time as may be reasonably required for the exhaustion of its purpose.

It is so ordered.

---

[11] The appropriate standard for evaluating claims of danger to the national interest is suggested by analogy to dicta in first amendment cases dealing with prior restraints on publication:

> No one would question but that [when a nation is at war] a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.

Near v. Minnesota, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357 (1931). *See Halperin v. Department of State*, 565 F.2d 699, 706-07 (D.C. Cir. 1977) (suggesting possible application of prior restraint standard to "extraordinary" circumstances raised by FOIA litigation).

FRIEDMAN, Chief Judge, concurring:

This is a difficult and perplexing case which requires the reconciliation of two lines of conflicting congressional directives.

1. On the one hand, two sets of statutes counsel secrecy. First, there are the statutes authorizing the Secretary to account for these expenditures by merely certifying their amount without disclosing their nature. 22 U.S.C. § 2671(a) (1976); 31 U.S.C. § 107(1976). The procedure of accounting for expenditures relating to foreign affairs secretly through certificates is almost as old as the Constitution. In the Act of Feb. 9, 1793, ch. IV, § 2, 1 Stat. 299, 300, Congress empowered the President to account for all money spent "for the purposes of intercourse or treaty, with foreign nations," either specifically or by certificates, "as he may think it advisable." This section was codified in the Revised Statutes of 1878. R.S. § 291.

The present version gives the President the same choice in accounting for all expenditures "for the purposes of intercourse or treaty with foreign nations . . . as he may think it advisable." 31 U.S.C. § 107. In 1979, $2,350,000 was appropriated "to enable the Secretary of State to meet unforeseen emergencies arising in the Diplomatic and Consular Service," to be accounted for under section 107. Act of Sept. 24, 1979, Pub.L. No. 96-68, title I, 93 Stat. 416, 417.

Second, in 1980, Congress passed the General Accounting Office Act of 1980, Pub. L. No. 96-226, 94 Stat. 311. Section 101 authorizes the General Accounting Office to audit an expenditure accounted for solely by certificate "to determine whether the expenditure was, in fact, actually made and whether such expenditure was authorized by law." 31 U.S.C. § 67(f)(1) (Supp. IV 1980).

While the Act imposes some control and oversight on those expenditures, their confidentiality is maintained.

The results of such audits may be released only to the President and the head of the agency involved and, solely in cases of discrepancies, to the Senate Committee on Government Affairs, the House Committee on Government Operations, and the Senate and House committees having legislative and appropriations authority over the particular agency. *Id.* § 67(f)(2).

Further, the President may exempt from audit expenditures "which relate to sensitive foreign intelligence or foreign counter-intelligence activities, or sensitive law enforcement investigations." *Id.* § 67(f)(3)(B).

Section 102 of the Act gives the Comptroller General subpoena powers to conduct the audits. He cannot, however, issue or enforce a subpoena for (1) materials relating to foreign intelligence or foreign counterintelligence activities; (2) materials that, by statute, cannot be disclosed to him, under the same standards as exemption 3 of the Freedom of Information Act provides; or (3) materials that exemptions 5 and 7 of the Freedom of Information Act, 5 U.S.C. §§ 552(b)(5), 552(b)(7) (1976), cover, the disclosure of which could impair substantially governmental operations. 31 U.S.C. § 54(d) (Supp. IV 1980). All information he receives is subject to the same level of confidentiality as it had in the originating agency. *Id.* § 54(e).

The congressional concern in the Act was to maintain the secrecy of these records and materials while at the same time making the agencies accountable for their secret expenditures. S.Rep. No. 570, 96th Cong., 2d Sess. 3-8, *reprinted in* 1980 U.S. Code Cong. & Ad. News 732, 734—39. Congress intended the certificates to remain secret; it limited distribution even to itself. As the district court said, it does not make sense to release, under the Freedom of Information Act, materials that Congress itself does not see. *Washington Post Co. v.*

Department of State, 501 F. Supp. 1152, 1157 (D.D.C. 1980).

2. On the other hand, as the court notes, the Freedom of Information Act, 5 U.S.C. § 552 (1976 & Supp. IV 1980), imposes broad requirements of disclosure subject to detailed and carefully delineated exemptions. The courts have recognized that the nine exemptions in the Freedom of Information Act are the exclusive exceptions to the general rule of disclosure. *E.g.*, *Department of Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976); *Jordan v. Department of Justice*, 192 U.S. App. D.C. 144, 147, 591 F.2d 753, 756 (1978). The Department of State has relied solely on exemption 3. It claims that 22 U.S.C. § 2671(a) and 31 U.S.C. § 107 together justify nondisclosure of material relating to the Emergency Fund.

The court convincingly shows that exemption 3 cannot be used to protect confidentiality of this material. In that exemption Congress imposed exacting requirements governing the kind of confidentiality statutes that would justify nondisclosure. As the court demonstrates, although the two statutes upon which the State Department relies reflect congressional intent to maintain confidentiality of the Emergency Fund, they do not meet the strict standards Congress imposed in exemption 3.

3. The statutes I have referred to in part 1 leave no doubt in my mind that if Congress ever had considered whether to permit disclosure under the Freedom of Information Act of material relating to the Emergency Fund, it would not have permitted such disclosure. In the Freedom of Information Act, however, Congress did not address the question. I agree with the court that there is no basis upon which we can ignore or seriously distort the language and standards of exemption 3 to reach a result that we think Congress would have favored if it had considered the problem.

4. On the record before us we cannot tell or even guess the true nature of the material the plaintiff seeks or the effect, if any, its disclosure would have upon the foreign relations of the United States. I therefore fully agree with the court's action in giving the government and the district court the opportunity on remand to invoke or consider other exemptions in the Freedom of Information Act as a basis for maintaining the confidentiality of this material. If all or some of this material has been classified, exemption 1 might cover it. The government might be able to invoke the privilege covering state secrets, *see United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), and if it did, exemption 5 might apply. Other exemptions also might be available. Furthermore, this may be a situation where only some but not all of the material might be protected against disclosure. These are issues the district court may consider on the remand. I understand the court's opinion as giving the district court broad discretion in handling the matter. Finally, under our decision Congress will have the opportunity to take legislative action to maintain the confidentiality of the Emergency Fund if it deems that course appropriate.

The steps that the court has taken to provide further opportunity to protect the Emergency Fund material against disclosure seem to me to be as far as it properly may go. I do not see how, however, consistent with the Freedom of Information Act, the court on the present record could hold that exemption 3 covers this material or that there is some other basis for protecting it against disclosure.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2469

THE WASHINGTON POST COMPANY, APPELLANT

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 80-01092)

ON DENIAL OF REHEARING EN BANC

Filed December 28, 1982

Before: ROBINSON, *Chief Judge*, WRIGHT, TAMM, MACKINNON, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK AND SCALIA, *Circuit Judges*

ORDER

Appellees' suggestion for rehearing *en banc* has been circulated to the full Court. A majority of the Court has not voted in favor of the suggestion. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

A statement on the denial of rehearing *en banc*, filed by *Circuit Judge* SCALIA, in which *Circuit Judges* MACKINNON and and BORK concur, is attached.

SCALIA, *Circuit Judge:* We believe this case should be reheard *en banc*, not merely because the effect of the panel decision is to overturn a congressionally approved tradition and practice of confidentiality in foreign affairs matters that is almost two centuries old. It is conceivable that Congress produced that surprising result, either intentionally or inadvertently, in the 1976 Amendments to the Freedom of Information Act (FOIA), Pub. L. No. 94-409, 90 Stat. 1247 (1976). Rather, the source of our concern is that in arriving at that surprising result the panel decision embraced a process of statutory interpretation that makes nonsense of legislation enacted *after* the 1976 Amendments. Thus, we find that we now have on the books a statute, enacted in 1980, which places the most detailed limitations upon access by the Comptroller General, by employees of the Executive branch, and even by Members of Congress themselves, to a category of material which (according to the panel decision) any member of the public may obtain at will.* 31 U.S.C. § 67(f) (Supp. IV 1980).

Such a perverse result is contrary to the commonsense prescription, elevated to a rule of statutory construction, that "[s]tatutes in pari materia, although in apparent conflict, are so far as reasonably possible construed to be in harmony with each other." 2A Sutherland, *Statutory Construction* (C. Sands 4th ed. 1973) § 51.02 at 290. The 1976 Amendments to FOIA may reasonably be said to have rendered that rule inapplica-

---

*The panel's assurance that it is "not to be understood as implying that there is no FOIA exemption that could conceivably encompass the disputed material," slip op. at 14, is a hollow one, insofar as it is meant to apply to the full range of material here in question. Other exemptions, such as the exemption for classified material, 5 U.S.C. §552(b)(1), may apply to particular items, but only Exemption 3 can conceivably cover the entire category of material that the 1980 statute so scrupulously withholds from all government officials except a designated few.

ble insofar as *previously* enacted statutes are concerned, since the avowed purpose of those Amendments was to eliminate some of the secrecy which earlier statutes preserved. *See* H.R. Rep. No. 880 (Part I), 94th Cong., 2d Sess. 23 (1976); H.R. Rep. No. 1441, 94th Cong., 2d Sess. 25 (1976) (Conference Report). It is quite another matter, however, to elevate FOIA to what other courts have disapprovingly called "a prospective pre-emption" of future legislation. *King* v. *IRS*, Nos. 81-2137 & 81-3081 (7th Cir. Sept. 10, 1982), slip op. at 14, quoting from *Zale Corp. v. IRS*, 481 F. Supp. 486, 489 (D.D.C. 1979). Such an approach to legislative construction lays traps for the unwary, in Congress and the Executive branch as well as among the general public, and impedes the development of a coherent body of law in this field.

We believe that the application of Exemption 3 to confidential expenditures cannot properly be assessed on the basis of its legislative history alone, and without regard to related subsequent enactments. The opinion of the panel barely mentions the 1980 statute; the concurring opinion acknowledges that its coexistence with the panel's disposition "does not make sense," slip op. at 2, but apparently regards that as an issue separate and apart from the proper interpretation of Exemption 3. In our view, the later enactment was a factor that demanded attention—not as an isolated phenomenon whose incompatibility with the court's interpretation of Exemption 3 could be marvelled at, but as an essential element of the interpretive process itself. The 1980 legislation does not, to be sure, specifically deal with disclosure to the public, but its assumptions and implications with regard to such disclosure could not be clearer. And in another respect it is more specifically directed to the present question than the 1976 legislative history, since it addresses disclosure of confidential

expenditures in particular, rather than disclosure of government information in general.

The language of Exemption 3 would certainly bear the interpretation that the Government urged. As the panel opinion indicates, the dispute comes down to whether the criterion "unforeseen emergencies arising in the diplomatic and consular service," 22 U.S.C. § 2671 (1976), is particular enough to qualify as a "particular criteri[on] for withholding" within the meaning of Exemption 3. We hardly think that the language of the 1976 statute and its legislative history provide such a clear answer to that abstruse question that the later legislation cannot be accommodated, as traditional canons of interpretation would demand. That is the course we would follow, making it unnecessary to remand the case in the hope that the district court might devise some way to undo the harm produced.

We have thought it worthwhile to express these views not only because the specific result in the present case may be harmful to the national interest, but because the theory of "prospective pre-emption" which the panel decision represents is sure to confuse the application of future laws and to swell unnecessarily the list of FOIA filings.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 80-1092

THE WASHINGTON POST COMPANY, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF STATE, ET AL., DEFENDANTS

Nov. 24, 1980

MEMORANDUM AND ORDER

GESELL, District Judge.

This Freedom of Information Act case is before the Court on cross motions for summary judgment, which have been fully briefed and argued. Plaintiff is seeking access to records concerning expenditures made by the State Department from the appropriations for Emergencies in the Diplomatic and Consular Service. The State Department contends that the material is protected from disclosure under Exemption 3 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3) (1976), which applies to material "specifically exempted from disclosure by statute," and cites as the controlling statutes 22 U.S.C. § 2671 (1976)[1] and 31 U.S.C. § 107

---

[1] The statute states:

> The Secretary of State is authorized to
>
> (a) make expenditures, from such amounts as may be specifically appropriated therefor, for unforeseen emergencies arising in the diplomatic and consular service and, to the extent authorized in appropriation Acts, funds expended for such purposes may be accounted for in accordance with section 107 of Title 31; and
>
> (b) delegate to subordinate officials the authority vested in him by section 107 of Title 31 pertaining to certification of expenditures.

(1976).[2] Plaintiff argues that these statutes are not sufficient to support a claim under Exemption 3. For reasons stated below, the Court sustains the secrecy of this special fund in order to carry out the manifest intention of Congress.

It will be instructive first to review briefly the sequence of events in this case. On October 3, 1979, a *Washington Post* investigative reporter wrote the State Department seeking "all records and other materials relating to the State Department's Fine Arts Committee." Two days later, before the State Department had responded to the reporter's first request, the reporter wrote a second letter supplementing his original request to include "some additional records that only partially relate to the finances of the committee." In this second letter the reporter stated that he desired access to the "ledger sheets and schedules of disbursements and receipts" from account numbered 19X8822 and from the account known as the Secretary of State's Emergency Fund. This enlarged request covered all

[2] The statute states:

> Settlement of expenses of intercourse with foreign nations
>
> Whenever any sum of money has been or shall be issued, from the Treasury, for the purposes of intercourse or treaty with foreign nations, in pursuance of any law, the President is authorized to cause the same to be duly settled annually with the General Accounting Office, by causing the same to be accounted for, specifically, if the expenditure may, in his judgment, be made public; and by making or causing the Secretary of State to make a certificate of the amount of such expenditure, as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sum therein expressed to have been expended.

material in the two accounts for the previous three years, and was no longer limited to payments relating to the Fine Arts Committee.

The State Department responded on October 29, 1979, agreeing to provide access to material included in account numbered 19X8822, but denying access to information concerning the Emergency Fund. The reporter appealed, and on March 6, 1980, the Appeals Review Panel of the Department of State again denied the request, stating that "a long history of practice and Congressional understanding" supported the claim for Exemption 3 under the statutes cited. The newspaper subsequently initiated this lawsuit, seeking access to all records of expenditures from the Emergency Fund for the past three years.

It is clear from evidence presented by the parties that the Emergency Fund has been used to finance a variety of activities, ranging from payments to foreign informers in visa and passport fraud cases to receptions for donors to the Committee on Fine Arts.[3]

Exemption 3, amended in 1976 to narrow the exclusion, is quite explicit. Its coverage is limited to material

> specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld.

The reasoning behind Exemption 3 and the congressional history of this exemption have been discussed by the Supreme Court, *see, e.g., Consumer Product Safe-*

---

[3] At oral argument, the Court asked counsel for defendants to provide a generic index of the types of expenditures made from the Emergency Fund. A copy of the index provided is attached hereto as Appendix A. Although defendants offered to file an *in camera* memorandum describing the classified expenditures, the Court did not request such a memorandum.

ty Commission v. GTE Sylvania, Inc., 447 U.S. 102, 100 S.Ct. 2051, 2062-63, 64 L.Ed.2d 766 (1980), and analyzed at length by the Court of Appeals for this Circuit, *see, e.g., Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 826-29 (D.C. Cir. 1979); *Irons & Sears v. Dann*, 606 F.2d 1215, 1219-21 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075, 100 S.Ct. 1021, 62 L.Ed.2d 757 (1980). There is no need to recite that history here. Suffice it to say that Exemption 3 is triggered only by statutes that either leave an administrator no discretion as to whether or not disclosure is permitted, or which provide sufficient guidance by specifying particular criteria to be followed or by specifying only a limited range of material to be withheld that the decision is "a legislative determination and not an administrative one." *Irons & Sears v. Dann, supra*, 606 F.2d at 1220.

Although there are no simple rules with which to determine whether 22 U.S.C. § 2671 (1976) and 31 U.S.C. § 107 (1976) are sufficient for Exemption 3, the Court's consideration of the two statutes and of other statutes analyzed under Exemption 3[4] make it clear that the exemption does not apply in this case. The statutes on which the State Department relies are too general in the discretion granted the Secretary and lack standards for the control of that discretion.

Under 22 U.S.C. § 2671 (1976), the Secretary of State simply is authorized to spend funds "for unfore-

---

[4] For examples of statutes examined by courts under Exemption 3, *see, e.g., Consumer Production Safety Commission v. GTE Sylvania, supra*, (15 U.S.C. § 2055(b)(1) (1976)); *Halperin v. CIA*, 629 F.2d 144 (D.C.Cir. 1980) (50 U.S.C. §§ 403(d)(3) & 403g (1976)); *American Jewish Congress v. Kreps*, 574 F.2d 624 (D.C. Cir. 1978) (reviewing statute then codified at 50 U.S.C. App. § 2406(c)); *Serbian Eastern Orthodox Diocese v. Department of State*, No. 77-1413 (D.D.C., filed Dec. 30, 1977) (8 U.S.C. § 1202(f) (1976)).

seen emergencies arising in the diplomatic and consular service" and "may" account for those funds with the certification procedure set forth in 31 U.S.C. § 107 (1976). He also "may not" decide to use the certification procedure, however, and no guidance is provided as to when that discretion should be exercised. The wording of 31 U.S.C. § 107 (1976) is equally general, authorizing the Secretary of State to use the certification procedure for expenditures when "he may think it advisable not to specify" the use. There are no limiting criteria set forth.[5] Defendants concede that clause (A) of Exemption 3 does not apply, for the Secretary of State does have discretion whether to disclose information. It is equally clear that clause (B) cannot properly be invoked, because the statutes specify neither particular criteria nor particular types of material to be withheld.

Under both statutes, the Secretary's total discretion to withhold all expenditures from the Emergency Fund is simply too broad a blanket unqualified dispensation to fall within the exemption. Every statute necessarily will refer, with more or less specificity, to "particular types of matter." In the case of the Emergency Fund, it is undisputed that payments have been made from the Fund for state dinners and receptions, gifts to for-

[5] At oral argument and in post-hearing submissions, the parties discussed whether the structure of the State Department's responsibilities did not impose certain limitations on expenditures. In an affidavit filed with the post-hearing briefs, Benjamin H. Read, Under Secretary of State for Management, stated that it was his interpretation of 22 U.S.C. § 2671 (1976) that he "may authorize public disclosure of expenditures from that appropriation when the particular public disclosure is determined not to be harmful to the conduct of foreign relations." Although this interpretation may provide some guidance for disclosure decisions, it clearly is the result of executive decisionmaking and not the product of legislative action. Thus, it can carry scant weight under Exemption 3. *Cf. American Jewish Congress v. Kreps*, 574 F.2d 624, 628 (D.C. Cir. 1978).

eign individuals, expenses of Foreign Service inspectors, and receptions for contributors to the State Department's Fine Arts Committee. To permit the fact that all payments were made from the Emergency Fund to be by itself a sufficient standard to satisfy the "particular types of matter to be withheld" requirement would rob the standard of any meaning.

The State Department apparently concedes that the statutes themselves do not suffice to meet the standards for Exemption 3, for defendants have contended strenuously that "such apparent generality as may appear from the words of the law itself does not in practice exist." In particular, defendants argue that accounting requirements and precedent serve to check the Secretary's discretion with regard to the Emergency Fund. The Court recognizes that precedent has been invoked in other FOIA cases in analyzing the availability of Exemption 3. *See, e. g., Irons & Sears v. Dann, supra*, 606 F.2d at 1220-21. But here, unlike the circumstances in *Irons & Sears*, the precedents are so varied and the limits so few that it cannot fairly be said that precedent serves as an adequate check on the "broad agency discretion ... that Congress sought to eliminate." *Sims v. CIA*, Nos. 79-2203 & 79-2554, slip op. at 14 (D.C. Cir., filed Sept. 29, 1980).

But this case does not fit neatly into the accepted analysis that has developed for applying Exemption 3 to various statutes granting discretionary authority to release or withhold information. The traditional authority is faulty here for there is brought into sharp conflict other actions by Congress indicating its intent, in the exercise of clear constitutional authority, to withhold the very information that the traditional Exemption 3 analysis would require be disclosed. Thus, although this case was briefed and argued as a typical Exemption 3 case, defendants' failure to withstand the type of analysis usually attempted in Exemption 3 cases cannot be

permitted to end the matter in this particular unique instance.

The Court in the circumstances presented here must consider the actions of Congress in exercising its authority under the "Statement and Account Clause" found in Article 1, Section 9, Clause 7 of the United States Constitution. That clause states that

> No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Congress has expressed its authority under the clause to keep the expenditures secret and this use of constitutional power cannot lightly be ignored.

The meaning of the Statement and Account Clause in the FOIA context recently was analyzed by the Court of Appeals for this Circuit in *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir., 1980). In that case, the plaintiff sought information regarding employment of private attorneys by the CIA. The Court held that 50 U.S.C. § 403(d)(3) (1976) and 50 U.S.C. § 403g (1976) provided an exemption for the requested material under Exemption 3. The Court went on, however, and examined the history of the Statement and Account Clause. The Court concluded that "the Framers of the Clause intended it to leave discretion in Congress and the Executive to define reporting requirements for foreign intelligence operations and related expenditures." *Id.*, slip op. at 37.

The material sought here is closely related to the material sought in *Halperin*,[6] and the same result nondis-

---

[6] At least some of the money from the Emergency Fund has been spent specifically for foreign informers, see text at footnote 3, *supra*, & Appendix A, and the entire fund is restricted to use in the diplomatic and consular service, *see* 22 U.S.C. § 2671 (1976).

closure must obtain. Although there have been recodifications through the years, 31 U.S.C. § 107 (1976) is derived from the Act of Feb. 9, 1793, 1 Stat. 299, 300, the same Act scrutinized in *Halperin* as the source of authority for secrecy in appropriating funds for the CIA. *See Halperin v. CIA*, *supra*, 629 F.2d at 158. It is uncontroverted that the Congress throughout history has granted the Executive authority to make payments without disclosing them publicly. Express authority was granted to the President in the Appropriations Act of 1887, 24 Stat. 478, 481, to spend funds for unforeseen emergencies in the diplomatic and consular service. Prior to that time, other amounts had been appropriated to be spent on the certificate of the Secretary of State for expenses in connection with the Neutrality Act. *See* H.R. Rep. No. 2508, 84th Cong., 2d Sess. 13, *reprinted in* [1956] U.S. Code Cong. & Admin. News, pp. 4017, 4027. In 1956, Congress passed the statute now codified as 22 U.S.C. § 2671 (1976), which expressly grants the Secretary of State authority to make expenditures from the Emrgency Fund and to account for the funds only by certificate. Pub. L. No. 84-885, 70 Stat. 890-91 (1956). That statute has remained unchanged since 1956. It is clear, then, that the secrecy provided expenditures such as those that comprise the bulk of the Emergency Fund dates back to the beginning of the nation, and that the practice of certification by the Secretary of State has long been endorsed by Congress.

Although this appears to be the first case in which a plaintiff has sought access to information concerning this particular fund, there has been significant litigation over similar limits on the reporting of expenditures by the Central Intelligence Agency. *See, e.g., United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974); *Halperin v. CIA*, *supra; Harrington v. Bush*, 533 F.2d 190 (D.C. Cir. 1977). These cases

uniformly recognize "nearly two centuries of acceptance of a reading of cl. 7 [the Statement and Account Clause] as vesting in Congress plenary power to spell out the details of precisely when and with what specificity Executive agencies must report the expenditure of appropriated funds and to exempt certain secret activities from comprhensive public reporting." *United States v. Richardson*, *supra*, 418 U.S. at 178 n. 11, 94 Ct. at 2947 n. 11; *see Harrington v. Bush*, *supra*, 553 F.2d at 194 & n. 7. *See also* Note, *The CIA's Secret Funding and the Constitution*, 84 Yale L.J. 608, 609-616 (1975) (analyzing history and limits of "Statement and Account" Clause). Nearly 100 years ago, it was stated that in the appropriations area," [t]he absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people." *Hart's Case*, 16 Ct. Cl. 459, 484 (1880), *affirmed*, 118 U.S. 62, 6 S.Ct. 961, 30 L.Ed. 96 (1886). The same "absolute control" applies to control over the reporting of expenditures.

As far as the Emergency Fund is concerned, Congress has regularly exercised its oversight authority under the clause. Indeed, as recently as April of this year, Congress passed and the President signed legislation that subjects expenditures from the Emergency Fund to a limited audit by the General Accounting Office in order to ensure that funds are expended properly. *See* Pub. L. No. 96-226, 94 Stat. 311 & S. Rep. 96-570, 96th Cong., 2d Sess., *reprinted in* [1980] U.S. Code Cong. & Admin. News, pp. , . The law both strengthens Congress' oversight of uses of the Emergency Fund and preserves the secrecy of those expenditures, for GAO employees involved in the audit may release information only to other GAO employees and to the President, the Secretary of State, and, in certain instances, to members of Congress. *Id.* Furthermore,

the President may exempt from this audit transactions that he determines should be kept in even stricter secrecy.[7]

For plaintiff to prevail in this case, the Court would be required to find that the Freedom of Information Act was intended to repeal this long exercised authority by Congress to maintain secrecy in the expenditure of funds affecting the nation's foreign relations, and, in particular, secrecy in expenditures from the Emergency Fund. There is, of course, no indication in any legislative history that FOIA was ever for a moment intended to have any such effect. Indeed, the stringent controls on disclosure included in the recent legislation authorizing GAO audits of the Fund would be meaningless if a FOIA request could compel release of that same information. Under these circumstances, the Court will not impute to Congress the intent for such radical disclosures under FOIA, or the abandonment of its constitutional power, and the plenary authority of Congress in this area will be respected.

It should be noted that plaintiff has made a strong showing that the Emergency Fund can be used as a "catch all" by the State Department, and that the State Department has essentially unbridled discretion in deciding what to disclose and what will remain secret. Furthermore, the fact that the State Department voluntarily has disclosed some of the expenditures from the Fund indicates that strict secrecy is not required in

---

[7] Congress has passed two other bills in recent years as well that demonstrate its continuing scrutiny of the Emergency Fund. *See* Pub. L. No. 95-105, 91 Stat. 866 (codified at 22 U.S.C. § 2694 (Supp. III 1979)) (requiring report to Congress on all gifts to foreign individuals purchased from the Emergency Fund); Pub. L. No. 94-350, 90 Stat. 827 (codified at 22 U.S.C. § 2690 (1976)) (establishing partial audit of Emergency Fund by GAO).

all instances.[8] But it is not for this Court to determine which expenditures should be revealed and which should not,[9] just as it is not for this Court to order wholesale disclosures. The authority lies only with Congress and the Secretary of State.

For the foregoing reasons, plaintiff's motions for summary judgment and partial summary judgment are denied. Defendants' motion for summary judgment is granted. The case is dismissed. The Clerk of Court is directed to enter judgment accordingly.

SO ORDERED.

APPENDIX A

DEPARTMENT OF STATE

Emergencies in the Diplomatic and Consular Service

Major Categories of expenditures

Emergency Evacuations—evacuation of U.S. Government employees and their dependents and private U.S. citizens when their lives are endangered by war, civil unrest or natural disaster. (Other U.S. government agencies reimburse the Department to cover expenses incurred on their behalf. Private U.S. citizens sign promissory notes to repay the cost of their evacuation. Repayment made during the fiscal year in which the expenditures were made are used to defray expenses incurred. Repayments received following the close of the fiscal year revert to the U.S. Treasury.)

---

[8] The court is mindful, of course, that the intent of FOIA is disclosure and does not mean to discourage further disclosures by the Secretary of State to the extent he believes appropriate

[9] Even if this Court had the authority to determine which expenditures would properly be disclosed, and which would not, prudential concerns might well compel the Court to withhold its involvement in such a delicate, on-going task. *Cf. Winpisinger v. Watson*, 628 F.2d 133 (D.C.Cir., 1980).

Relief and Repatriation Loans—loans to destitute citizens abroad. Loans are made to U.S. citizens to provide for their return to the United States. Promissory notes are obtained. Funds collected are deposited to Miscellaneous Receipts of the Treasury.

Visits by Foreign Chiefs of State or Heads of Government—expenses incurred in connection with official visits to the President (State dinner, receptions, other food, lodging and travel expenses within the United States).

Presidential Delegations to Foreign Inaugurations, Funerals, etc.—travel expenses of the official U.S. delegations.

Presidential, Vice-Presidential and Congressional Travel Abroad—expenses incurred in connection with official travel to foreign countries including advance arrangements, escort and official entertainment.

Secretary of State Travel—expenses incurred by the Secretary in connection with travel in the U.S. and abroad including official entertainment.

Domestic Representation and Entertainment—expenses incurred by the Secretary and other principal officers in connection with official representational functions.

Special Overseas Representation—expenses incurred for official functions not covered by the Representation Allowance appropriation, e.g. American business representatives and Congressional delegations when the majority of the guests are not foreigners.

Passport and Visa Fraud—expenses incurred in connection with investigations and apprehension of groups or individuals involved in fraudulent issuance of U.S. passports and visas.

Official Gifts to Foreign Dignitaries—cost of gifts of nominal value given by the President, Vice President or Secretary of State.

Note: There are also some limited but highly classified expenditures directly related to sensitive foreign relations missions that cannot be disclosed in an unclassified document.*

Also during fiscal year 1980 and 1981, there have been expenditures made in connection with the Iranian hostage situation.

*During oral argument on November 5, 1980, the Court indicated that it would not be favorably disposed to an *in camera*, classified presentation of categories of expenditures which could not be disclosed in open court, however, the Department of State is prepared to make such a presentation should the Court wish.

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provision

Article I, Section 9, Clause 7 of the United States Constitution provides:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Statutory Provisions

1. The Freedom of Information Act, 5 U.S.C. 552, provides in relevant part:

> **§ 552 Public information; agency rules, opinions, orders, records and proceedings**
>
> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> * * * * *
>
> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; . . . .

2. 22 U.S.C. 2671 provides:

§ 2671. Emergency expenditures; delegation of authority pertaining to certification of expenditures

The Secretary of State is authorized to—

(a) make expenditures, from such amounts as may be specifically appropriated therefor, for unforeseen emergencies arising in the diplomatic and consular service and, to the extent authorized in appropriation Acts, funds expended for such purposes may be accounted for in accordance with section 107 of Title 31; and

(b) delegate to subordinate officials the authority vested in him by section 107 of Title 31 pertaining to certification of expenditures.

3. 22 U.S.C. (Supp. V) 2694 provides:

§ 2694. Limitations on purchase of gifts for foreign individuals; report to Speaker of the House and chairman of the Committee on Foreign Relations of the Senate

(1) After September 30, 1977, no appropriated funds, other than funds from the "Emergencies in the Diplomatic and Consular Service" account of the Department of State, may be used to purchase any tangible gift of more than minimal value (as defined in section 7342(a)(5) of Title 5) for any foreign individual unless such gift has been approved by the Congress.

(2) Beginning October 1, 1977, the Secretary of State shall annually transmit to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate a report containing details on (1) any gifts of more than minimal value purchased with appropriated funds which were given to a foreign individual during the previous fiscal year, and (2) any other gifts

of more than minimal value given by the United States Government to a foreign individual which were not obtained using appropriated funds.

4. a. 31 U.S.C. 107, which was in effect at the time of the expenditures in question and at the time of the court of appeals' decision, provided:

> **§ 107. Settlement of expenses of intercourse with foreign nations**
>
> Whenever any sum of money has been or shall be issued, from the Treasury, for the purposes of intercourse or treaty with foreign nations, in pursuance of any law, the President is authorized to cause the same to be duly settled annually with the General Accounting Office, by causing the same to be accounted for, specifically, if the expenditure may, in his judgment, be made public; and by making or causing the Secretary of State to make a certificate of the amount of such expenditure, as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sum therein expressed to have been expended.

b. In Section 1 of Pub. L. No. 97-258, 96 Stat. 877, 964-965, the substance of 31 U.S.C. 107 was recodified as 31 U.S.C. 3526(e), which provides:

> **§ 3526. Settlement of accounts**
>
> * * * * *
>
> (e) When an amount of money is expended under law for a treaty or relations with a foreign country, the President may—
>
> (1) authorize the amount to be accounted for each year specifically by settlement of the Comptroller General when the President decides the amount expended may be made public; or
>
> (2) make, or have the Secretary of State make, a certificate of the amount expended if the President decides the amount is not to be accounted for specifically. The certificate is a sufficient voucher for the amount stated in the certificate.

5. 31 U.S.C. 3524 (the substance of which was formerly contained in 31 U.S.C. (Supp. V) 67(f), as added by Section 101 of the General Accounting Office Act of 1980, Pub. L. No. 96-226, 94 Stat. 311-312, as recodified by Section 1 of Pub. L. No. 97-258, 96 Stat. 877, 963), provides:

> **§ 3524. Auditing expenditures approved without vouchers**
>
> (a)(1) The Comptroller General may audit expenditures, accounted for only on the approval, authorization, or certificate of the President or an official of an executive agency, to decide if the expenditure was authorized by law and made. Records and related information shall be made available to the Comptroller General in conducting the audit.
>
> (2) The Comptroller General may release the results of the audit or disclose related information only to the President or head of the agency, or, if there is an unresolved discrepancy, to the Committee on Governmental Affairs of the Senate, the Committee on Government Operations of the House of Representatives, and the committees of Congress having legislative or appropriation oversight of the expenditure.
>
> (b) Before December 1 of each year, the Director of the Office of Management and Budget shall submit a report listing each account that may be subject to this section to the Committees on the Budget and Appropriations of both Houses of Congress, the Committee on Governmental Affairs, and to the Committee on Government Operations, and to the Comptroller General.
>
> (c) The President may exempt from this section a financial transaction about sensitive foreign intelligence or foreign counter-intelligence activities or sensitive law enforcement investigations if an audit would expose the identifying details of an active investigation or endanger investigative or domestic intelligence sources involved in the investigation.

The exemption may apply to a class or category of financial transactions.

(d) This section does not—

(1) apply to expenditures under section 102, 103, 105(d)(1), (3), or (5), or 106(b)(2) or (3) of title 3; or

(2) affect authority under section 8(b) of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403j(b)).

(e) Information about a financial transaction exempt under subsection (c) of this section or a financial transaction under section 8(b) of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403j(b)) may be reviewed by the Permanent Select Committee on Intelligence of the House and the Select Committee on Intelligence of the Senate.

(f) Subsections (a)(1) and (d)(1) of this section may be superseded only by a law enacted after April 3, 1980, specifically repealing or amending this section.

6. The Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1977, Pub. L. No. 94-362, 90 Stat. 937, 938, provides in relevant part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Departments of State, Justice, and Commerce, the Judiciary, and related agencies for the fiscal year ending September 30, 1977, and for other purposes, namely:

* * * * *

For expenses necessary to enable the Secretary of State to meet unforeseen emergencies arising in the Diplomatic and Consular Service, to be expended pursuant to the requirement of section 291 of the Revised Statutes (31 U.S.C. 107), $2,100,000.

7. The Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1978, Pub. L. No. 95-86, 91 Stat. 419, 420, provides in relevant part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Departments of State, Justice, and Commerce, the Judiciary, and related agencies for the fiscal year ending September 30, 1978, and for other purposes, namely:
>
> * * * * *
>
> For expenses necessary to enable the Secretary of State to meet unforeseen emergencies arising in the Diplomatic and Consular Service, to be expended pursuant to the requirement of section 291 of the Revised Statutes (31 U.S.C. 107), $2,350,000.

8. The Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1979, Pub. L. No. 95-431, 92 Stat. 1021, 1022, provides in relevant part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Departments of State, Justice, and Commerce, the Judiciary, and related agencies for the fiscal year ending September 30, 1979, and for other purposes, namely:
>
> * * * * *
>
> For expenses necessary to enable the Secretary of State to meet unforeseen emergencies arising in the Diplomatic and Consular Service, to be expended pursuant to the requirement of section 291 of the Revised Statutes (31 U.S.C. 107), $2,350,000.

9. The Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-68, 93 Stat. 416, 417, provides in relevant part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Departments of State, Justice, and Commerce, the Judiciary, and related agencies for the fiscal year ending September 30, 1980, and for other purposes, namely:
>
> * * * * * *
>
> For expenses necessary to enable the Secretary of State to meet unforeseen emergencies arising in the Diplomatic and Consular Service, to be expended pursuant to the requirement of section 291 of the Revised Statutes (31 U.S.C. 107), $2,350,000.

Office-Supreme Court, U.S.
FILED
OCT 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1925

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES DEPARTMENT OF STATE AND
GEORGE P. SHULTZ, SECRETARY OF STATE, PETITIONERS

v.

WASHINGTON POST COMPANY

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE PETITIONERS SUGGESTING MOOTNESS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1925

UNITED STATES DEPARTMENT OF STATE AND
GEORGE P. SHULTZ, SECRETARY OF STATE, PETITIONERS

v.

WASHINGTON POST COMPANY

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE PETITIONERS SUGGESTING MOOTNESS

The Solicitor General, on behalf of the petitioners, the Department of State and the Secretary of State, suggests that this case has been rendered moot by virtue of respondent's withdrawal of its request for the documents involved.

The issue in this case is whether the Department of State properly withheld from disclosure under the Freedom of Information Act documents pertaining to the expenditure of funds from a special annual appropriation for unforeseen expenditures arising in the diplomatic and consular service. The court of appeals held that the documents are not exempt from disclosure under Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), and that the documents could not be withheld on the ground that the special statutory scheme by which Congress has regulated public disclosure in the specific area of government receipts and expenditures in any

event takes precedence over the FOIA (Pet. App. 1a-15a). On October 3, 1983, the Court granted the petition for a writ of certiorari to review the judgment of the court of appeals.

By letter dated October 24, 1983, respondent, through counsel, has now withdrawn its request for the records in question and represents that neither respondent nor its reporter, Ronald Kessler, has any present intention to request such records in the future.[1] We suggest that the withdrawal of respondent's FOIA request renders this case moot. We therefore respectfully submit that the judgment of the court of appeals should be vacated and that the case should be remanded to the court of appeals with directions that it instruct the district court to dismiss the case as moot. See, *e.g., Central Intelligence Agency* v. *Holy Spirit Association for the Unification of World Christianity*, 455 U.S. 997 (1982); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950). Counsel for respondent has authorized us to represent that respondent joins in the suggestion of mootness and of the disposition proposed above.

REX E. LEE
Solicitor General

OCTOBER 1983

---

[1]A copy of the letter from counsel for respondent to Willard A. De Pree, Acting Undersecretary of State for Management, is reproduced as an appendix to this memorandum.

APPENDIX

LAW OFFICES

WILLIAMS & CONNOLLY

HILL BUILDING
839 SEVENTEENTH STREET, N. W.
WASHINGTON, D.C. 20006

AREA CODE 202
331-5000

October 24, 1983

Mr. Willard A. De Pree
Acting Undersecretary of State
for Management
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Re: *Freedom of Information Act Request*

Dear Mr. De Pree:

This firm represents Ronald Kessler and the Washington Post in connection with Mr. Kessler's Freedom of Information Act request of October 5, 1979 for "ledger sheets and schedules of disbursements and receipts of the Secretary of State's Emergency Fund." The request was specifically limited to data for the previous three years.

Four years have passed since the State Department denied Mr. Kessler's request on October 29, 1979. Although the State Department has never released the requested information, the Post has obtained sufficient information from other sources in the past two years to publish two stories on the Emergency Fund. As you are aware, the matter is the subject of continuing litigation in the federal courts.

The Post does not wish to pursue further its FOIA request for records pertaining to the Secretary of State's Emergency Fund. Accordingly, on behalf of the Post and Mr. Kessler, I hereby withdraw the request for those records, and represent that neither the Post nor Mr. Kessler has any present intention to request such records in the future.

Very truly yours,

/s/ KEVIN T. BAINE

Kevin T. Baine

KTB/vlc

cc: Kenneth S. Geller, Esquire

(THIS PAGE INTENTIONALLY LEFT BLANK)

(THIS PAGE INTENTIONALLY LEFT BLANK)

Office - Supreme Court, U.S.
FILED
JUN 28 1983
ALEXANDER L. STEVAS,

No. 82-1925

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

UNITED STATES DEPARTMENT OF STATE, *et al.*,
Petitioners,

v.

THE WASHINGTON POST COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDWARD BENNETT WILLIAMS
Counsel of Record
DAVID E. KENDALL
KEVIN T. BAINE
RICHARD S. HOFFMAN
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006
(202) 331-5000
Counsel for Respondent
The Washington Post Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the statutes that authorize expenditures out of a special appropriation for "unforeseen emergencies arising in the diplomatic and consular service" are within the scope of Exemption 3 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(3), thereby protecting the records of such expenditures from public disclosure.

2. Whether the nine specific statutory exemptions, 5 U.S.C. § 552(b)(1)-(9), constitute the sole source for determining if records of such expenditures are exempt from the mandatory disclosure provisions of FOIA.

RULE 28.1 LISTING

The following are subsidiaries of respondent The Washington Post Company: Newsweek, Inc. (wholly owned subsidiary); Newsweek Services, Inc. (wholly owned second-level subsidiary); Post-Newsweek Stations, Inc. (wholly owned subsidiary); Post-Newsweek Stations, Florida, Inc. (wholly owned second-level subsidiary); Post-Newsweek Stations, Connecticut, Inc. (wholly owned second-level subsidiary); Post-Newsweek Stations, Michigan, Inc. (wholly owned second-level subsidiary); Post-Newsweek Video, Inc. (wholly owned second level subsidiary); Legi-Slate, Inc. (wholly owned subsidiary); Bowater Mersey Paper Company Ltd. (49% ownership); Robinson Terminal Warehouse Corp. (97.2% ownership); Los Angeles Times-Washington Post News Service (50% ownership); International Herald Tribune, S.A. (30% ownership); The Daily Herald Company (wholly owned subsidiary); Newsprint, Inc. (wholly owned subsidiary); Bear Island Paper Co. (33.3% ownership); SportsView New York, Inc. (wholly owned subsidiary); and SportsView New England, Inc. (wholly owned subsidiary).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 28.1 LISTING	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	8
I. The Government's Petition For Certiorari Is Premature	8
II. The Court Of Appeals' Decision Relies On A Well Settled Construction Of Exemption 3 And Is Consistent With The Decisions Of Other Courts Of Appeals	9
III. The Court Of Appeals Properly Adhered To The Explicit Recognition By This Court That The Nine FOIA Exemptions Are Exclusive	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:	Page
Allen v. *C.I.A.*, 636 F.2d 1287 (D.C. Cir. 1980)	19
American Jewish Congress v. *Kreps*, 574 F.2d 624 (D.C. Cir. 1978)	12, 14
Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostock Railroad Co.*, 389 U.S. 327 (1967)	8
Chamberlain v. *Kurtz*, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979)	15, 19
Church of Scientology v. *United States Postal Service*, 633 F.2d 1327 (9th Cir. 1980)	12, 13
Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980)	10
De Laurentiis v. *Haig*, 686 F.2d 192 (3d Cir. 1982)	15
Department of the Air Force v. *Rose*, 425 U.S. 352 (1976)	18, 19
Environmental Protection Agency v. *Mink*, 410 U.S. 73 (1973)	19
Estelle v. *Gamble*, 429 U.S. 97 (1976)	8
FAA Administrator v. *Robertson*, 422 U.S. 255 (1975)	7, 10, 13
F.B.I. v. *Abramson*, 456 U.S. 615 (1982)	19
Ferri v. *Bell*, No. 78-841 (M.D. Pa. Aug. 20, 1979)	12
Ferri v. *Bell*, 645 F.2d 1213 (3d Cir. 1981), *modified*, 671 F.2d 769 (3d Cir. 1982)	12, 13
Founding Church of Scientology, Inc. v. *National Security Agency*, 610 F.2d 824 (D.C. Cir. 1979)	15
Getman v. *NLRB*, 450 F.2d 670 (D.C. Cir. 1971)	19
Goland v. *C.I.A.*, 607 F.2d 339 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980)	15
Goldstein v. *Cox*, 396 U.S. 471 (1970)	8
Halperin v. *C.I.A.*, 629 F.2d 144 (D.C. Cir. 1980)	15
Hamilton Shoe Co. v. *Wolf Brothers*, 240 U.S. 251 (1916)	8
Irons and Sears v. *Dann*, 606 F.2d 1215 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980)	10, 12, 15
King v. *IRS*, 688 F.2d 488 (7th Cir. 1982)	19
Lee Pharmaceuticals v. *Kreps*, 577 F.2d 610 (9th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979)	12, 15

TABLE OF AUTHORITIES—Continued

	Page
Medina-Hincapie v. *Department of State*, 700 F.2d 737 (D.C. Cir. 1983)	15
Mercer v. *Theriot*, 377 U.S. 152 (1964)	9
National Commission on Law Enforcement and Social Justice v. *C.I.A.*, 576 F.2d 1373 (9th Cir. 1978)	15
Westchester General Hospital, Inc. v. *Department of Health, Education & Welfare*, 464 F. Supp. 236 (M.D. Fla. 1979)	13
White v. *IRS*, No. 81-3613 (6th Cir. May 26, 1983)	19
Zale Corp. v. *IRS*, 481 F. Supp. 486 (D.D.C. 1979)	19
Statutes:	
Central Intelligence Agency Act of 1949, Section 7, 50 U.S.C. § 403g (1976)	16
Classification Act of 1949, Pub. L. No. 86-36, Section 6, 73 Stat. 64 (1959), 50 U.S.C. § 402 note (1976)	15, 16
Freedom of Information Act, 5 U.S.C. § 552 (1976 & Supp. V 1981)	*passim*
5 U.S.C. § 552(a)(3)	18
5 U.S.C. § 552(b)(1)	9
5 U.S.C. § 552(b)(3)	*passim*
5 U.S.C. § 552(b)(7)	9
5 U.S.C. § 552(c)	18
General Accounting Office Act of 1980, Pub. L. No. 96-226, 94 Stat. 311	16-17, 19
Government in the Sunshine Act, Pub. L. No. 94-409, Section 5(b), 90 Stat. 1246 (1976)	10
Immigration and Naturalization Act, Section 222(f), 8 U.S.C. § 1202(f) (1976)	15
Internal Revenue Code, Section 6103, 26 U.S.C. § 6103 (1976)	15, 19
Patent Act, Section 22, 35 U.S.C. § 122 (1976)	15
Social Security Act, Section 1106, 42 U.S.C. § 1306 (1976)	13
Trade Secrets Act, 18 U.S.C. § 1905 (1976)	13
Pub. L. No. 94-362, 90 Stat. 938	2
Pub. L. No. 95-86, 91 Stat. 420	2

TABLE OF AUTHORITIES—Continued

	Page
Pub. L. No. 95-431, 92 Stat. 1022	2
Pub. L. No. 96-68, 93 Stat. 417	2, 3
22 U.S.C. § 2671 (1976)	*passim*
22 U.S.C. § 2694 (Supp. V 1981)	9
28 U.S.C. § 354 (1976)	13
29 U.S.C. § 410(c)(6) (1976)	13
31 U.S.C. § 54, recodified at 31 U.S.C.A. § 716 (West 1983)	17
31 U.S.C. § 67(f), recodified at 31 U.S.C.A. § 3524 (West 1983)	17
31 U.S.C. § 107, recodified at 31 U.S.C.A. § 3526(e) (West 1983)	*passim*
42 U.S.C. § 1306 (1976)	13
49 U.S.C. § 1504 (1976)	13
50 U.S.C. § 403(d)(3) (1976)	16
Miscellaneous:	
H.R. Rep. No. 96-425, 96th Cong., 1st Sess. (1979)	18
H.R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. (1976)	10, 13
H.R. Rep. 94-880, Part I, 94th Cong., 2d Sess. (1976)	7, 13
S. Rep. No. 86-284, 86th Cong., 1st Sess. (1959)	16
S. Rep. No. 89-812, 89th Cong., 1st Sess. (1965)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES DEPARTMENT OF STATE, *et al.*,
Petitioners,

v.

THE WASHINGTON POST COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT OF THE CASE

On October 5, 1979, respondent The Washington Post Company ("The Post"), through its reporter Ronald Kessler, filed a request with the Department of State pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1976 & Supp. V 1981), for records consisting of "ledger sheets and schedules of disbursements and receipts of the Secretary of State's Emergency Fund . . . " C.A. App. 9. The request was for records "for the past three years only."

By letter dated October 29, 1979, Under Secretary of State for Management, Benjamin H. Read, informed Kessler that such records would not be made available under FOIA because they were "exempt by law from public disclosure under authority of 22 U.S.C. 2671 and 31 U.S.C. 107 . . . These records, or portions of records are exempt from disclosure under Section (b)(3) of the Freedom of Information Act (5 U.S.C. 552(b)." C.A. App. 10-11.

The first statute relied upon by Under Secretary Read, 22 U.S.C. § 2671, provides that the Secretary of State is authorized to "make expenditures . . . for unforeseen emergencies arising in the diplomatic and consular service," and to account for those expenditures in accordance with 31 U.S.C. § 107. *See* Petition for Writ of Certiorari at 39a (hereafter Petition). Section 107 of Title 31, in turn, provides that the President "may," if he "think[s] it advisable," account for expenditures secretly by "certificate." *See id.* at 40a.[1]

The appropriation for unforeseen emergencies arising in the diplomatic and consular service (the "Emergency Fund") is a line item in the budget of the Department of State. For the fiscal year ending September 30, 1980, for example, Congress appropriated $2,350,000 "[f]or expenses necessary to enable the Secretary of State to meet unforeseen emergencies arising in the Diplomatic and Consular Service . . . ." Pub. L. No. 96-68, 93 Stat. 417 (1980).[2]

Kessler filed a written appeal from the denial of his FOIA request, C.A. App. 12-15, arguing that neither 22 U.S.C. § 2671 nor 31 U.S.C. § 107 offer the Secretary of State any criteria, standards, or guidelines for the decision to withhold records, and therefore neither statute meets the requirements of Exemption 3 of FOIA. That exemption provides that FOIA does not apply to materials

> specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a man-

---

[1] 22 U.S.C. § 2671 was enacted in 1956; Section 107 of 31 U.S.C. was enacted in 1921. After the decision below, Title 31 was recodified without substantive change and Section 107 is now Section 3526(e). For consistency, respondent cites Title 31 in the same manner as petitioners. *See* Petition at 3 n.1.

[2] Congress has used identical language in all appropriation acts pertinent to this lawsuit. *See* Pub. L. No. 94-362, 90 Stat. 938; Pub. L. No. 95-86, 91 Stat. 420; Pub. L. No. 95-431, 92 Stat. 1022.

> ner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

The appeal was denied, C.A. App. 16, and on May 1, 1980, The Post brought suit in the United States District Court for the District of Columbia in order to enforce its rights under FOIA. C.A. App. 14-16. During the course of discovery, the government admitted in answer to an Interrogatory that "there are no written policy statements, regulations, guidelines, standards, or criteria other than those set forth in 22 U.S.C. Section 2671 and 31 U.S.C. Section 107 by which the Under Secretary of State for Management determines which expenditures from the appropriation for Emergencies in the Diplomatic and Consular Service are to be accounted for in accordance with 31 U.S.C. Section 107." C.A. App. 19-20. The government also provided The Post with certain documents describing the uses of the Emergency Fund which already had been disclosed. C.A. App. 23-52.

On September 30, 1980, the government moved for summary judgment, C.A. App. 53, arguing that 31 U.S.C. § 107, 22 U.S.C. § 2671, and Pub. L. No. 96-68, 93 Stat. 417, taken together, are sufficient to meet the requirements for exemption from disclosure established by Exemption 3 of FOIA. The Post cross-moved for summary judgment on the ground that the statutes in question on their face give to the Secretary of State unfettered discretion whether to disclose the records sought and hence do not qualify under Exemption 3. C.A. App. 72. In addition, The Post opposed the government's motion for summary judgment on the ground that there were genuine issues of fact in the record concerning whether certain expenditures had been properly allocated. C.A. App. 77-78. The record indicated, for example, that in the past the Secretary had allocated to this appropriation such predictable and routine items as receptions for those who had contributed to the State Department's Fine Arts

Committee,[3] and "official . . . state dinners, luncheons and receptions" for visiting heads of state.[4] The record also demonstrated that at one time the Secretary of State allocated to the Emergency Fund appropriation expenditures used to reimburse Foreign Service Inspectors for certain foreseeable expenses.[5] Such expenditures, The Post contended, raised a material question of fact concerning whether the records the government sought to hold secret on the basis of 22 U.S.C. § 2671 and 31 U.S.C. § 107 were properly so withheld, even assuming that the district court were to hold that these statutes fell within the protection of Exemption 3 of FOIA.

The district court, in ruling on the motions for summary judgment, agreed with The Post that Exemption 3 of FOIA "does not apply in this case." C.A. App. 161:

> Under 22 U.S.C. § 2671 (1976), the Secretary of State simply is authorized to spend funds "for unforeseen emergencies arising in the diplomatic and consular service" and "may" account for those funds with the certification procedure set forth in 31 U.S.C. § 107 (1976). He also "may not" decide to use the certification procedure, however, and no guidance is provided as to when that discretion should be exercised. The wording of 31 U.S.C. § 107

---

[3] This information was provided to respondent through an ancillary and verbal FOIA request and is set forth in a letter to Kessler from Mary Ann Petrino, Information and Privacy Staff, Foreign Affairs Document and Reference Center, Department of State (Nov. 19, 1979). C.A. App. 79.

[4] Letter from Richard Gookin, Assistant Chief of Protocol, to Kenneth Rankin (Sept. 11, 1978). C.A. App. 27. This letter was produced to respondent by petitioners pursuant to respondent's First Request for Production of Documents.

[5] The practice of utilizing the "Emergency Fund" for such routine non-emergency matters as home insurance and lawn care for foreign service inspectors has been severely criticized by the GAO, *see* C.A. App. 80-83, and petitioners have represented that this practice would be discontinued. C.A. App. 85.

(1976) is equally general, authorizing the Secretary of State to use the certification procedure for expenditures when "he may think it advisable not to specify" the use. There are no limiting criteria set forth. Defendants concede that clause (A) of Exemption 3 does not apply, for the Secretary of State does have discretion whether to disclose information. It is equally clear that clause (B) cannot properly be invoked, because the statutes specify neither particular criteria nor particular types of material to be withheld.

Under both statutes, the Secretary's total discretion to withhold all expenditures from the Emergency Fund is simply too broad a blanket unqualified dispensation to fall within the exemption. Every statute necessarily will refer, with more or less specificity, to "particular types of matter." In the case of the Emergency Fund, it is undisputed that payments have been made from the Fund for state dinners and receptions, gifts to foreign individuals, expenses of Foreign Service inspectors, and receptions for contributors to the State Department's Fine Arts Committee. To permit the fact that all payments were made from the Emergency Fund to be by itself a sufficient standard to satisfy the "particular types of matter to be withheld" requirement would rob the standard of any meaning.

C.A. App. 160-61 (footnotes omitted).

Although the district court found that the records sought by The Post could not be withheld on the basis of Exemption 3, and although the court at no time found any other exemption of FOIA to be applicable, the court nevertheless ruled that these records were exempt from disclosure. Noting that the statutes relied upon by defendants were of ancient vintage, the court concluded that absent an express legislative choice to require disclosure, more explicit than that contained in FOIA, it would not override the pre-existing statutory structure granting the Secretary discretion to release or withhold

expenditures from the Emergency Fund. Petition at 34a. Ignoring the fact that there was a disputed issue of fact whether expenditures allocated by the Secretary of State to the Emergency Fund had been properly so allocated, the court granted the government's motion for summary judgment and denied The Post's cross-motion. *Id.*

The court of appeals reversed, agreeing with the district court that 22 U.S.C. § 2671 and 31 U.S.C. § 107, the two statutes relied on by the government, failed to qualify under Exemption 3 of FOIA because they neither "establish[] particular criteria for withholding" nor "refer[] to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(B)(1976). The court of appeals recognized that 31 U.S.C. § 107 allows the Secretary unfettered discretion to permit or refuse disclosure "as he may think it advisable" and therefore provides no "particular criteria for withholding." *See* Petition at 7a-8a. Both the district court and the court of appeals rejected the government's contention that the phrase "emergencies arising in the diplomatic and consular service" sufficiently identified the "particular types of matters to be withheld" to qualify under Exemption 3. Relying on the particular facts of record in this case, the court of appeals held that

> the Government's submission to the District Court indicates a vast array of matters falling within the "emergencies" rubric ranging from Fine Arts Committee expenditures to travel expenditures for official delegations. 501 F.Supp. at 1158-59. This range does not become particular merely because Congress may have had some opportunity for overseeing it. This statute itself is, therefore, too broad to qualify for Exemption 3 withholding, even as construed by the Department. Petition at 10a.

The court of appeals rejected the district court's conclusion that, despite the unavailability of an FOIA exemption, the material requested need not be disclosed, relying in part on the congressional response to this

Court's decision in *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975). Judge McGowan recognized that the "action by Congress to amend Exemption 3 to 'eliminate the gap created in the Freedom of Information Act by the *Robertson* case,' H.R. Rep. No. 880 (Part I), 94th Cong., 2nd Sess. 23 (1976), U.S. Code Cong. & Admin. News (1976), p. 2205," emphatically demonstrated Congress's intent that FOIA must be taken to be "the definitive word on disclosure of the information in the Government's possession covered by it." Petition at 13a. The district court erred when it "went beyond its determination that the material did not fall within the relevant FOIA exemption. . . ." *Id.*

The court of appeals did not, however, order release of the requested documents, instead remanding the case to the district court for a determination of the potential applicability of FOIA exemptions not relied on by the Department of State in the proceedings below.[6] Petition at 14a. Moreover, the court expressly indicated the possibility of a stay permitting the government to seek congressional action if it could establish a sufficient danger to the national interest from any release of documents which might be ordered by the district court on remand. *Id.* at 14a-15a.[7]

---

[6] Because the court ruled that Exemption 3 did not apply, it did not reach The Post's alternative argument that the district court also erred in granting summary judgment for the government because there existed material issues of fact whether the requested records were properly classified as expenditures under the statutes relied upon by the government.

[7] On December 28, 1982, the full court of appeals denied rehearing *en banc*, three judges dissenting. Pursuant to a motion filed by the government, the panel, on January 20, 1983, stayed issuance of the mandate for thirty days. On March 29, 1983, the panel granted the government an additional twenty days in which to either file a petition for writ of certiorari or advise the appellate court of its decision not to file. By order dated March 22, 1983, the Chief Justice extended the time for the government to file a writ of certiorari

REASONS FOR DENYING THE WRIT

I. The Government's Petition For Certiorari Is Premature.

Under well settled principles governing the determination whether to grant certiorari, this petition is premature. The government mentions only in passing that the court of appeals ordered release of not a single document requested by respondent. Instead, the court remanded to the district court for a consideration of "the applicability of any other FOIA exemptions, whether raised by the Department of State or by the court itself, *sua sponte*." Petition at 14a (footnote omitted). "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock Railroad Co.*, 389 U.S. 327, 328 (1967) (per curiam). It has been held on several occasions that "this Court above all others must limit its review of interlocutory orders." *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 258 (1916).

This case presents no occasion for the Court to depart from "its normal practice of denying interlocutory review." *Estelle* v. *Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J. dissenting). If and when the district court and the court of appeals determine that the documents sought by respondent must be released, the government will have an opportunity to seek review in this Court on any appropriate grounds,[8] including the applicability of

---

to May 27, 1983, and on May 2, 1983, the court of appeals granted the government an additional thirty day stay of the mandate. This petition followed on May 27, 1983, over ten months after the panel of the court of appeals reversed the opinion of the district court on the merits, and five months after the full court of appeals denied rehearing *en banc*.

[8] If, as the Government suggests, expenditures under the Emergency Fund included payment of informers, in addition to funding luncheons and parties, it may well be that the former is protected by FOIA exemptions that the government chose not to rely

Exemption 3. *See Mercer* v. *Theriot*, 377 U.S. 152, 153-54 (1964) (per curiam); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. at 257-59.

It may be that none of the documents requested will ultimately be ordered released, and it may be that the material ordered released will be limited to such routine items as "official . . . state dinners, luncheons and receptions," [9] gifts to foreign individuals,[10] predictable expenses of Foreign Service Inspectors,[11] and receptions for contributors to the Department of State's Fine Arts Committee [12]—all matters that have concededly been funded through the Emergency Fund. The issue of whether Congress intended that expenditures such as these be shielded from public view, respondent respectfully urges, is not one requiring use of this Court's scant time and resources—particularly where, as here, no final judgment has been rendered and no documents have been ordered released.

II. The Court Of Appeals' Decision Relies On A Well Settled Construction Of Exemption 3 And Is Consistent With The Decisions Of Other Courts Of Appeals.

The court of appeals' application of Exemption 3 is consistent with the standards applied by every other circuit which has considered Exemption 3 in light of the amendment passed by Congress in 1976. As originally drafted, Exemption 3 applied to matters "specifically exempted from disclosure by statute." When this Court in

---

on below. *See* 5 U.S.C. § 552(b)(7). The government may also argue on remand that any material which is "authorized . . . by Executive order to be kept secret in the interest of . . . foreign policy," 5 U.S.C. § 552(b)(1) is exempt from disclosure.

[9] C.A. App. 27.

[10] *See* 22 U.S.C. § 2694 (Supp. V 1981).

[11] C.A. App. 38-42.

[12] C.A. App. 79.

FAA Administrator v. *Robertson*, 422 U.S. 255 (1975), interpreted Exemption 3 to mean that Congress intended "to permit the numerous laws then extant allowing confidentiality to stand," Congress swiftly "overrule[d]" the Court by enacting the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1246 (1976). H.R. Conf. Rep. No. 94-1441, 94th Cong. 2d Sess. 14 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 2250 (Conference Report); *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 121-22 n.18 (1980).

Exemption 3 as amended contains two clauses. Clause (A) refers to statutes which require that "matters be withheld from the public in such a manner as to leave *no* discretion on the issue." (Emphasis supplied). As the government concedes, Petition at 13 n.9, this clause can have no application to the instant case, since the two statutes on which petitioners rely, 22 U.S.C. § 2671 and 31 U.S.C. § 107, leave the decision whether to disclose expenditures from the Emergency Fund to the complete discretion of executive officials. *See Irons and Sears* v. *Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980).[13]

---

[13] That the Secretary of State is free to disclose expenditures is evidenced by the fact that petitioners have already provided The Post, pursuant to an FOIA request, documents revealing the use of the Emergency Fund for such expenditures as support of the State Department's Committee on Fine Arts. C.A. App. 79.

Other expenditures from this Fund which the Secretary has chosen to disclose include the cost of luncheons and receptions for state visits (letter from Richard Gookin, Assistant Chief of Protocol, to Kenneth E. Rankin (Sept. 11, 1978), C.A. App. 27; the cost of gifts distributed by Mrs. Henry Kissinger during travel with the Secretary of State, letter from Stuart W. Rockwell, to Sen. William Proxmire (Nov. 12, 1974), C.A. App. 29; total cost of catered functions hosted by Secretary Kissinger during 1974, letter from Patrick N. Theros, Staff Assistant, Office of the Deputy Under Secretary for Management, to Edward Tropeano (Oct. 7, 1975), C.A. App. 30-32; the cost of a luncheon/cruise hosted by Mrs. Rosalynn Carter for the wives of U.S. Senators and delegates from Panama, letter

The second clause of Exemption 3, clause (B), refers to statutes that "establish[] particular criteria for withholding or refer[] to particular types of matters to be withheld." It is clear from the record in this case, and both courts below so found, that the first part of clause (B) has no application to this case, for neither 22 U.S.C. § 2671 nor 31 U.S.C. § 107 provides any criteria at all, much less "particular criteria," to guide executive decisions regarding disclosure of expenditures from the Emergency Fund. Under Secretary of State Read, in his sworn answers to Interrogatories, admitted that "there are no written policy statements, regulations, guidelines, standards, or criteria other than those set forth in 22 U.S.C. Section 2671 and 31 U.S.C. Section 107" which inform the Secretary whether or not to disclose expenditures from the Emergency Fund. C.A. App. 19-20.

The issue the government seeks to have this Court address, therefore, is the application of the second part of Exemption 3(B) to the particular and unique language of the statute providing for certificate accounting of a discretionary fund of the Department of State—a fund which, by the government's own admission, accounts for under .25% of the total State Department budget. Petition at 13. Because the method of analysis employed below is consistent with other cases decided pursuant to Exemption 3, as amended, and the application of that analysis affects such a discrete and limited category of records, this case is not worthy of certiorari.

In determining whether the statutes relied on by the government sufficiently described the "particular types of

---

from Barbara Ennis, Director, Freedom of Information Staff, Department of State, to Thomas Donahue, Executive Vice-President, Citizen's Choice (Oct. 20, 1977) C.A. App. 35-36; the cost of chartering private aircraft to remove American citizens from Teheran, Iran, letter from Under Secretary of State for Management, to Mr. Leo Bourne (Jan. 24, 1980); C.A. App. 37. These letters were produced by petitioners to The Post pursuant to The Post's First Request for Production of Documents.

matter" to be withheld, the district court and the court of appeals first looked to whether the wording of the statutes "evidence a congressional determination that certain materials ought to be kept in confidence." *Irons and Sears* v. *Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980). "Nondisclosure is countenanced by Subsection (B), if, but only if, the enactment is the product of congressional appreciation of the dangers inherent in airing particular data and incorporates a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw." *American Jewish Congress* v. *Kreps*, 574 F.2d 624, 628-29 (D.C. Cir. 1978). The legislative history of Exemption 3 demonstrates "congressional sense that the crucial distinction lay between statutes that in some manner *told* the official what to do about disclosure and those that did not significantly inform his discretion in that regard." *Id.* at 629 (emphasis in original).

Other courts have uniformly followed the consistent approach of the D.C. Circuit in examining whether the questioned legislation demonstrates a particularized congressional judgment which specifically informed the agency of the purpose and objective of refusing disclosure. *See Ferri* v. *Bell*, 645 F.2d 1213, 1217 n.4 (3d Cir. 1981), *modified*, 671 F.2d 769 (3d Cir. 1982);[14] *Church of Scientology* v. *United States Postal Service*, 633 F.2d 1327, 1330 (9th Cir. 1980); *Lee Pharmaceuticals* v. *Kreps*, 577 F.2d 610 (9th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *see also Irons and Sears* v. *Dann*, 606 F.2d at 1219-21. Where, as here, the statute provides no guidance and permits the administrator unfettered dis-

---

[14] "[W]hen Congress revised Exemption 3 in 1976, it was concerned with removing from its compass laws which gave the agency discretion to withhold any information it wanted . . . . Basic policies regarding government secrecy are to be made by the Legislative, rather than the Executive branch . . ." *Ferri* v. *Bell*, No. 78-841, slip op. at 10 (M.D. Pa. Aug. 20, 1979).

cretion, subject only to his subjective view of the "national interest," the legislative history makes clear, and the courts have uniformly held, Exemption 3 does not apply. *See* H.R. Rep. No. 94-880, Part I, 94th Cong., 2d Sess. 22-23 (1976) (statutes such as "the Federal Aviation Act of 1958 that was the subject of *Robertson*, and which affords the FAA Administrator *carte blanche* to withhold any information he pleases, would not come within exemption 3."),[15]

The court of appeals additionally inquired whether the phrase "emergencies arising in the diplomatic and consular service" might refer to a discrete category of expenditures so as to itself limit the Secretary's authority to withhold records. Both the district court and the court of appeals recognized, however, that "[e]very statute necessarily will refer, with more or less specificity, to 'particular types of matter' . . . To permit the fact that all payments were made from the Emergency Fund

---

[15] In addition to the statute at issue in *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975), which prohibited disclosure of any document filed with the Administrator when "in their judgment" such disclosure would be contrary to the "interest of the public," 49 U.S.C. § 1504 (1976), Congress also specifically stated that Exemption 3 does not include section 1106 of the Social Security Act, 42 U.S.C. § 1306 (1976), which prohibited the Secretary of Health, Education and Welfare and the Secretary of Labor from disclosing, under penalty of criminal conviction, any record, report or other information submitted to HEW or the Department of Labor except pursuant to regulations prescribed by the Secretary. H.R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. 14 (1976). Courts have also held that pre-existing statutes relating to FBI "rap sheets," *Ferri* v. *Bell*, 645 F.2d 1213 (3d Cir. 1981), *modified*, 671 F.2d 769 (3d Cir. 1982) (construing 28 U.S.C. § 354), Postal Service investigatory records, *Church of Scientology* v. *United States Postal Service*, 633 F.2d 1327 (9th Cir. 1980) (29 U.S.C. § 410(c)(6)), and the Trade Secrets Act, 18 U.S.C. § 1905, *Westchester General Hospital, Inc.* v. *Department of Health, Education & Welfare*, 464 F.Supp. 236 (M.D. Fla. 1979), do not qualify under Exemption 3 because they leave to the administrative agency, without guidance from Congress, under what circumstances and by what criteria documents may be withheld.

to be by itself a sufficient standard to satisfy the 'particular types of matter to be withheld' requirement would rob the standard of any meaning." Petition at 9a, 29a. If the requirements of Exemption 3(B) are to be met, the "matter" subject to withholding must be identified by Congress and not left to the unfettered discretion of the administrator. *See American Jewish Congress* v. *Kreps*, 574 F.2d at 630-31. In this case, the Secretary has unfettered discretion to determine not only whether an expenditure from the Emergency Fund should be disclosed, but also whether an expenditure should be allocated to the Emergency Fund in the first place.

The government suggests that expenditures from the Fund in fact fall into several quite narrow "categories," Petition at 14, but that suggestion finds no support in the record. Both the district court and the court of appeals recognized that according to "the Government's submission . . . a vast array of matters fall[] within the 'emergencies' rubric, ranging from Fine Arts Committee expenditures to travel expenditures for official delegations." Petition at 10a, 29a-30a. The government fails to identify any limitation imposed by Congress on the "types of matter" covered by the Emergency Fund; each time a new use of the Fund is made, at the complete discretion of the Secretary, a new "category" is created.[16]

The straightforward application of FOIA to the particular statute and facts of record in this case is entirely consistent with the approach taken in similar cases by other circuits. The cases cited by the government, hold-

---

[16] Contrary to the government's suggestion, the court below did not find the Fund had been used for "an unduly wide range of purposes," Petition at 14. Respondent contended in the district court, in opposition to the government's motion for summary judgment, that there were material questions of fact in the record regarding whether the Secretary had improperly utilized the fund for routine non-emergency expenditures. C.A. App. 77-83. Because the court of appeals found that the statutes relied on do not satisfy Exemption 3, it did not reach this issue.

ing statutes sufficient to meet the language of Exemption 3, employ the same statutory analysis and arrive at a different conclusion based on the particular language and structure of the statutes in question.[17] This case is readily distinguishable, for example, from the decisions of the District of Columbia and other circuits holding exempt from disclosure information concerning the "organization or any function of the National Security Agency," Pub. L. No. 86-36, Section 6, 73 Stat. 64 (1959),[18] or "intelligence sources and methods" of the Central Intelligence Agency, 50 U.S.C. § 403(d)(3).[19] Those statutes, unlike 22 U.S.C. § 2671 and 31 U.S.C. § 107, provide both a policy which informed the agency

---

[17] *See, e.g., De Laurentiis* v. *Haig*, 686 F.2d 192 (3d Cir. 1982) (Section 222(f) of the Immigration and Naturalization Act, 8 U.S.C. § 1202(f) (1976) requiring the Secretary of State to maintain the confidentiality of "records . . . pertaining to the issuance or refusal of visas or permits to enter the United States" except where requested by a court pursuant of a certificate of need, sufficiently identified the "particular types of matter" to be withheld); *see also Medina-Hincapie* v. *Dep't of State*, 700 F.2d 737 (D.C. Cir. 1983) (same); *Chamberlain* v. *Kurtz*, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979) (Section 6103 of the Internal Revenue Code, 26 U.S.C. § 6103 (1976), exempt under Exemption 3 because it both sets out the criteria for determining when to withhold (whether disclosure would "seriously impair Federal tax administration"), and narrowly defines the type of information to be withheld); *Lee Pharmaceuticals* v. *Kreps*, 577 F.2d 610 (9th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979) (Section 122 of the Patent Act, 35 U.S.C. § 122 (1970), requiring patent applications be kept in confidence except in "special circumstances," provides a formula for non-disclosure (to protect the function of the patent office) and clearly identifies the particular matters not to be disclosed); *see also Irons and Sears* v. *Dann*, 606 F.2d 1215 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980) (same).

[18] *See Founding Church of Scientology, Inc.* v. *National Security Agency*, 610 F.2d 824, 827 (D.C. Cir. 1979).

[19] *See Halperin* v. *C.I.A.*, 629 F.2d 144 (D.C. Cir. 1980); *Goland* v. *C.I.A.*, 607 F.2d 339 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); *National Commission on Law Enforcement and Social Justice* v. *C.I.A.*, 576 F.2d 1373 (9th Cir. 1978).

of the congressional purpose for permitting withholding,[20] and categories which delimit the agency's discretion on the types of documents to be withheld.[21]

Finally, the government places great weight on the General Accounting Act of 1980, Pub. L. No. 96-226, 94 Stat. 311, which, *inter alia*, establishes procedures by

---

[20] Section 6 of the Classification Act of 1949, Pub. L. No. 86-36, 73 Stat. 64 (1959), 50 U.S.C. § 402 note (1976), directs the National Security Agency to "protect[] information laying open 'the organization and function of the National Security Agency,'" pursuant to a policy to eliminate publicity over NSA's "very classified functions vital to national security," S.Rep. No. 86-284, 86th Cong., 1st Sess. 1 (1959), *see Founding Church of Scientology, Inc.* v. *National Security Agency*, 610 F.2d at 827-28.

Congress, in 50 U.S.C. § 403(d)(3) (1976), explicitly instructed the Director of the CIA to protect "intelligence sources and methods," and commentators have interpreted this section to require "mandatory" nondisclose. *See Goland* v. *C.I.A.*, 607 F.2d at 350 n. 63. Section 403(d)(3) thus involves no discretion on the part of the agency to release or withhold records which fall into the limited category of documents included in the proviso. *See* n.16, *infra*.

[21] The NSA non-disclosure statute expressly refers to "names, titles, salaries or number of persons employed by the agency," 50 U.S.C. § 402 note (1976). To the extent the statute also permits non-disclosure regarding NSA's "activities" in general, *see id.*, the agency's discretion can be strictly limited by the expressed purpose to which the withholding must relate. *See Founding Church of Scientology, Inc.* v. *National Security Agency*, 610 F.2d at 829-833.

The CIA non-disclosure statute similarly limits the range of documents subject to withholding to those that would disclose the "organization, functions, names, official titles, salaries, or numbers of personnel employed by the agency." Section 7 of the CIA Act of 1949, 50 U.S.C. § 403g (1976).

The government somewhat disingenuously asserts that the court of appeals "acknowledged that the statutes involved in this case share 'common origins and general subject matter' with 50 U.S.C. § 403(d)(3)," Petition at 16. In fact, the court below recognized that petitioners' citation to the CIA statutes was unpersuasive because "[t]hese statutes, . . . share *little but* common origins and general subject matter," and "provide[] a vastly more precise blueprint than do the two open-ended statutes relied on in this case." Petition at 11a (emphasis supplied).

which the GAO may audit expenditures accounted for by certificate. *See* 31 U.S.C. § 67(f), recodified at 31 U.S.C.A. § 3524. The GAO Act, although evidencing a general reaffirmation of the certificate method of accounting, neither provides the Secretary of State with criteria by which to exercise his discretion whether to disclose records of the Emergency Fund, nor specifies the types of matters to be withheld. That Act, therefore, does not assist the government in arguing that 22 U.S.C. § 2671, enacted in 1956, and 31 U.S.C. § 107, enacted in 1921, meet the requirements of Exemption 3.

Moreover, the GAO Act is clearly limited to establishing standards and procedures for access to records by the Comptroller General, not by members of the general public. Section 54(b) of Title 31, recodified at 31 U.S.C.A. § 716(b), establishes procedures by which the Comptroller may obtain access to any records, not just those protected by the certificate method of accounting. The Act is structured as an independent access mechanism for the General Accounting Office; it contains its own exemptions that parallel and refer to FOIA exemptions and establishes for the first time the Comptroller General's right to bring a civil action in district court should the agency refuse to comply with a GAO request. *See* 31 U.S.C. § 54(d), recodified at 31 U.S.C.A. § 716(d).[22] The Act does not express a congressional judgment about when and by what criteria any "particular types of matter" should be

[22] In several respects the Act places greater restrictions on members of the Comptroller General's Office than FOIA imposes on members of the general public. In requesting any record, even one freely available to the public under FOIA, the Comptroller must "state the authority for inspecting the records and the reason for the inspection." 31 U.S.C. § 54(b)(1), recodified at 31 U.S.C.A. § 716(b)(1). For members of the general public, FOIA itself provides the authority to inspect agency records, and no reason or other authority for the inspection need be given. Whether it "makes sense" to impose restrictions on access to documents on another branch of government that are not imposed on the public at large is a decision properly left to Congress.

withheld. Indeed, the whole purpose of the statute was to increase GAO's access to records which agencies had been unreasonably withholding. *See* H.R. Rep. No. 96-425, 96th Cong., 1st Sess. 1, 4-9 (1979). Congress did not even hint that the detailed statutory structure (on its face applicable only to the Comptroller General) was intended to supplant or modify the well established standards governing exemptions from FOIA requests received from members of the general public. The proper "reconciliation" of the GAO Act and FOIA is that the former merely permits the preservation of confidentiality, even from the Comptroller General, of records that are otherwise exempt from disclosure under FOIA.

III. The Court Of Appeals Properly Adhered To The Explicit Recognition By This Court That The Nine FOIA Exemptions Are Exclusive.

The government argues that the court of appeals should have authorized withholding even if none of the FOIA exemptions apply. That argument ignores the unambiguous language of the Act and clear holdings of this Court.

If an agency has received a request for records within its possession, FOIA mandates that the agency "shall make the records promptly available. . ." 5 U.S.C. § 552(a)(3). This Court has consistently recognized that FOIA evidences a congressional purpose "of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of the Air Force* v. *Rose*, 425 U.S. 352, 360-61 (1976), *quoting*, S. Rep. No. 812, 89th Cong., 1st Sess. 3 (1965). "Congress provided in § 552(c) that nothing in the Act should be read to 'authorize withholding of information or limit the availability of records to the public, *except as specifically stated* . . .'" *Id.* at 361 (emphasis supplied). The specific statements are contained in the FOIA itself: "They are nine in number and are set forth in § 552(b) . . . 'These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c) . . .,' [*Environmental Protection Agency*

v. *Mink*, 410 U.S. 73, 79 (1973)], and must be narrowly construed." *Department of the Air Force* v. *Rose*, 425 U.S. at 1361. *See also F.B.I.* v. *Abramson*, 456 U.S. 615, 636 (1982) (O'Connor, J. dissenting). It is by now beyond dispute that courts have "no equitable jurisdiction to deny disclosure on grounds other than those laid out under one of the Act's enumerated exemptions." *Getman* v. *NLRB*, 450 F.2d 670, 678 (D.C. Cir. 1971); *see also Allen* v. *C.I.A.*, 636 F.2d 1287, 1289 n.11 (D.C. Cir. 1980).

Completely ignoring the clarity of the relevant legislative history, and utterly disregarding this Court's explicit recognition in *Rose* and *Mink* of the exclusive nature of the FOIA exemptions, the government argues that the FOIA exemptions are not exclusive. The only cases relied upon by the government in support of this novel position, *King* v. *IRS*, 688 F.2d 488 (7th Cir. 1982), and *Zale Corp.* v. *IRS*, 481 F. Supp. 486 (D.D.C. 1979), are not in conflict with the decision below. Both those opinions recognize that International Revenue Code § 6103, 26 U.S.C. § 6103, which permits non-disclosure of a narrowly defined class of "return information" which would seriously impair the federal tax administration, qualified as an Exemption 3 statute. *See King* v. *IRS*, 688 F.2d at 496; *Zale Corp.* v. *IRS*, 481 F. Supp. at 490 n.13; *see also White* v. *IRS*, No. 81-3613 (6th Cir. May 26, 1983); *Chamberlain* v. *Kurtz*, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979).[23] The

---

[23] To the extent that *Zale* and *King* may be read to suggest that § 6103 of the Internal Revenue Code provides grounds for withholding records apart from the application of Exemption 3, they are distinguishable from this case because § 6103 was enacted *after* the passage of FOIA. The statutes at issue in this case, of course, were enacted *before* the passage of FOIA, *see* n. 1, *supra*, and hence the reasoning of *Zale* and *King* has no application here.

Appellees attempt to remedy this deficiency by reference to the GAO Act of 1980, Pub. L. No. 96-226, 94 Stat. 311. Petition at 6, 20. But, as explained *supra*, there is in fact no conflict between the

decision of the court of appeals that the nine exclusive FOIA exemptions provide the sole grounds on which the Government may rely in withholding documents was mandated by the express intent of Congress and the pronouncements of this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
Counsel of Record

DAVID E. KENDALL
KEVIN T. BAINE
RICHARD S. HOFFMAN

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006
(202) 331-5000

Counsel for Respondent
The Washington Post Company

GAO Act and FOIA. The GAO Act establishes procedures for access to records by the Comptroller General and simply permits preservation of the confidentiality of certificate expenditures that are otherwise exempt from disclosure by FOIA.

Office-Supreme Court, U.S.
FILED
SEP 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1925

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES DEPARTMENT OF STATE AND
GEORGE P. SHULTZ, SECRETARY OF STATE, PETITIONERS

v.

THE WASHINGTON POST COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

American Jewish Conference v. *Kreps*, 574 F.2d 624 4

DeLaurentiis v. *Haig*, 686 F.2d 192 4

FAA Administrator v. *Robertson*, 422 U.S. 255 ..... 4, 6

FTC v. *Grolier, Inc.*, No. 82-372 (June 6, 1983), rev'g 671 F.2d 523 7

Irons & Sears v. *Dann*, 606 F.2d 1215, cert. denied, 444 U.S. 1075 4

King v. *IRS*, 688 F.2d 488 ..... 5, 6

United States v. *American Trucking Assns.*, 310 U.S. 534 3

White v. *IRS*, 707 F.2d 897 ..... 5, 6

Zale Corp. v. *IRS*, 481 F. Supp. 486 ..... 5, 6

Statutes:

Freedom of Information Act, 5 U.S.C. 552(b)(3) 3, 5, 7

22 U.S.C. 2671 3

26 U.S.C. 6103 6

31 U.S.C. (Supp. V) 67(f)(2), to be recodified at 31 U.S.C. 3524(a)(2) 6

31 U.S.C. 107 3

50 U.S.C. 402 note 5

50 U.S.C. 403(d)(3) 5

50 U.S.C. 403g 5

Page

Miscellaneous:

S. 1342, 98th Cong., 1st Sess. (1983) 2

S. Rep. No. 98-143, 98th Cong., 1st Sess. (1983) 2

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1925

UNITED STATES DEPARTMENT OF STATE AND
GEORGE P. SHULTZ, SECRETARY OF STATE, PETITIONERS

v.

THE WASHINGTON POST COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

---

1. Respondent essentially ignores the issue presented in this case: whether Congress, when it amended Exemption 3 of the Freedom of Information Act in 1976, intended implicitly to repeal the statutory authorization for the Secretary of State to account for certain specified funds solely by certificate and on that basis to maintain the confidentiality of such funds. It is clear that Congress did not so intend.

As we explain in the certiorari petition (at 2-3, 19), the statutory authorization for such certificate accounting and confidentiality is rooted in and is nearly as old as the Constitution, and other appellate decisions have insisted on a clear showing of congressional intent before concluding that longstanding traditions of confidentiality have been abandoned by the general terms of Exemption 3. But if there could be any doubt about the congressional intent in this

case, it is dispelled by Congress' action since the amendments to Exemption 3 were enacted in 1976. For each of the three fiscal years involved in this case — 1977, 1978 and 1979 — Congress included a provision in the annual appropriation act for the State Department expressly authorizing the Secretary to account by certificate for the expenditures at issue here (Pet. 4 & n.2). Congress cannot be presumed to have regarded these enactments as empty gestures, under which the certificate would carry no independent force and public disclosure of the certificated expenditures instead would be governed by the FOIA.[1] Furthermore, in 1980, when Congress enacted legislation permitting the Comptroller General to conduct a limited audit of the Emergency Fund, it reaffirmed that the expenditures involved are confidential and stressed that the results of the audit could be disclosed only to the President, to the head of the agency concerned and, in limited circumstances, to appropriate congressional committees (see Pet. 6). The Congress that placed such stringent restrictions on disclosure of confidential audits by the General Accounting Office surely did not intend to permit a public audit of the same expenditures by the *Washington Post*.

Respondent ignores these factors. It does not even mention the constitutional roots of the statutes involved and the longstanding tradition of confidentiality for the very records to which it seeks access. Nor does respondent offer any explanation why Congress might have wished to overturn that practice when it amended Exemption 3 in 1976, and it does not address the significance of the post-1976 appropriation acts showing that Congress in fact intended to

---

[1]Since the certiorari petition was filed, the Senate Foreign Relations Committee reported a bill (S. 1342, 98th Cong., 1st Sess. (1983)) to authorize appropriations for foreign relations matters that would clarify the purposes of the Emergency Fund and confirm that these expenditures are "confidential" in nature. S. Rep. No. 98-143, 98th Cong., 1st Sess. 25 (1983).

continue the prior practice. Respondent has, in short, wholly failed to answer the overwhelming indicia of congressional intent that the Secretary be permitted to maintain the confidentiality of certificated expenditures and records pertaining thereto.[2]

2. Instead of considering the problem in its proper historical and statutory context, respondent approaches the case as if the purpose of the inquiry were to grade Congress on its ability to draft a statute that satisfies some abstract standard of particularity, without regard to Congress' actual intent. But even on its own terms, respondent's argument is without merit.

First, respondent contends (Br. in Opp. 11-14) that the statutes at issue here do not satisfy Exemption 3 because they do not embody a formula to govern the Secretary's discretion whether to disclose information. Exemption 3, however, applies to matters specifically exempted from disclosure by a statute that either "establishes particular criteria for withholding *or* refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3) (emphasis added). Thus, even when no criteria for withholding are contained in the statute in question, the records are covered by Exemption 3 if the statute refers to "particular types of matters" to be withheld. Here, the governing statutes — 22 U.S.C. 2671, 31 U.S.C. 107, and the annual appropriation acts — are quite "particular" in their reference to the types of matters to be withheld: they permit withholding only of records pertaining to expenditures from a specific annual appropriation,

---

[2]Respondent does assert that it is no concern of this Court whether "it 'makes sense' to impose restrictions on access to documents on another branch of government that are not imposed on the public at large" (Br. in Opp. 17 n.22). But the issue here is the proper construction of various statutes, including Exemption 3 of the FOIA, and it is well settled that a statute should not be construed to produce absurd results. See *United States* v. *American Trucking Assns.*, 310 U.S. 534, 543 (1940).

limited in amount to far less than 1% of the annual appropriation for foreign affairs, for unforeseen emergencies arising in the diplomatic and consular service. Contrary to respondent's suggestion (Br. in Opp. 9-10, 13-14), this is not a case in which a broad range of information in the agency's possession might be swept into the exemption. Compare *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975), and *American Jewish Conference* v. *Kreps*, 574 F.2d 624, 628-629 (D.C. Cir. 1978).

The fact that Congress allowed the Secretary residual discretion to disclose some information *within* that narrow category does not detract from the particularity with which Congress has identified the category. See *DeLaurentiis* v. *Haig*, 686 F.2d 192, 194 (3d Cir. 1982); *Irons & Sears* v. *Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980). Moreover, disclosures regarding the Emergency Fund have been rather rare, so that in practice, as Congress understood when it enacted the 1980 GAO Act (see Pet. 6-7), the expenditures from this and other certificated accounts traditionally have been regarded by all concerned as confidential.[3]

---

[3]Respondent also contends that the Secretary has "unfettered discretion" to determine whether an expenditure should be allocated to the Fund in the first place and that there are no "limitations" on the types of matters for which the Fund may be used. See Br. in Opp. 14. This argument is misplaced. First, review of the substantive determination whether the Emergency Fund should be used for a particular expenditure is not the function of an FOIA suit, and respondent does not have standing to raise an objection to a particular use of the Fund. The question in this FOIA suit instead is whether respondent is entitled to receive records of whatever expenditures actually were made from the Fund. Second, there are in fact significant limitations on the use of the Fund. The most obvious is the amount of money Congress has appropriated for it. But in addition, the Fund has not been made available to sustain on-going State Department programs; it serves a supplementary, contingent purpose.

Second, contrary to respondent's contention (Br. in Opp. 14-16), the decision below cannot be reconciled with the decisions by the courts of appeals according Exemption 3 status to other statutes. For example, the statutes applicable to the National Security Agency and Central Intelligence Agency broadly permit withholding of any information about the "organization or any function" of the NSA, the "organization" and "functions" of CIA employees, and "intelligence sources and methods." 50 U.S.C. 402 note, 403(d)(3) and 403g. Unlike the provisions involved in this case, these statutes have an agency-wide sweep. Yet as respondent acknowledges (Br. in Opp. 15-16), the courts have respected the clear congressional purpose reflected in these statutes and held them to be covered by Exemption 3. There is no basis for a different result here.

3. As we explain in the certiorari petition (Pet. 21-22), other federal courts have held that a separate system of disclosure and exemption narrowly focusing on a discrete category of information must in any event take precedence over the more general provisions of the FOIA, at least where, as here, Congress has enacted laws after the 1976 amendments to Exemption 3 of the FOIA that provide for the confidentiality of the matters in question. See, *e.g.*, *King* v. *IRS*, 688 F.2d 488 (7th Cir. 1982); *Zale Corp.* v. *IRS*, 481 F. Supp. 486 (D.D.C. 1979). Since the certiorari petition was filed, another court of appeals has taken the same position. *White* v. *IRS*, 707 F.2d 897, 900 (6th Cir. 1983). A fortiori that analysis applies in this case, which involves a separate statutory system of disclosure and withholding rooted in the Constitution itself.

Respondent nevertheless suggests (Br. in Opp. 19) that there is no conflict between the decision below and *White*, *King* and *Zale* because the latter cases also held that the tax return information statute at issue in those cases is an

Exemption 3 statute. But that was only an alternative holding in each case. The court also held in each that, *quite aside from the application of Exemption 3*, the standards for disclosure under 26 U.S.C. 6103 must control. *White* v. *IRS, supra*, 707 F.2d at 900; *King* v. *IRS, supra*, 688 F.2d at 495; *Zale Corp.* v. *IRS, supra*, 481 F. Supp. at 488-491. There thus is a circuit conflict regarding the status of such distinct statutory disclosure and withholding schemes.[4]

4. Respondent errs in contending (Br. in Opp. 8-9) that the Court should deny certiorari because the court of appeals did not actually order the release of any documents but instead remanded for a determination of whether other FOIA exemptions might apply. In *FAA Administrator* v. *Robertson*, the court of appeals likewise had rejected the government's Exemption 3 argument but remanded for consideration of other exemptions the agency might wish to assert (see 422 U.S. at 260), and the respondent contended

---

[4]Respondent also attempts to distinguish *White*, *King* and *Zale* by contending (Br. in Opp. 19-20 n.23) that there is no conflict between the 1980 GAO Act and FOIA because, in its view, the 1980 Act permits the preservation of the confidentiality of only those certificated expenditures that are exempt from disclosure under FOIA. This argument fails for three reasons. First, respondent cites nothing in the text or legislative history of the 1980 Act to suggest that Congress intended to engraft such an implied limitation on the long-established certificate accounting procedure, and we are aware of nothing to support such a result. To the contrary, the plain wording of the 1980 legislation broadly protects from disclosure the "findings of [the] audit" or "any books, documents, papers, records, or other information concerning such expenditure" (31 U.S.C. (Supp. V) 67(f)(2), to be recodified at 31 U.S.C. 3524(a)(2)). Second, the holdings in *White*, *King* and *Zale* were not dependent upon a finding of a direct conflict between 26 U.S.C. 6103 and FOIA (in each case, the court found that the tax statute was covered by Exemption 3). The courts simply found a congressional intent to establish a distinct system of disclosure and withholding for tax return information. Third, the argument in this case does not depend on the 1980 Act alone. For each of the fiscal years in question, Congress also enacted a provision in an appropriation act specifically providing for certificate accounting and corresponding confidentiality.

that the case therefore was not ripe for review (Mem. in Opp. 12, No. 74-450 (1974 Term)). The government answered by noting that the court of appeals had issued a definitive interpretation of Exemption 3 that would control in the District of Columbia Circuit, where much FOIA litigation is concentrated, and that the Exemption 3 issue would not be affected by proceedings on remand (Reply Mem. 3, No. 74-450 (1974 Term)). The Court granted certiorari to consider the Exemption 3 issue in *Robertson*, and the same considerations warrant review here.[5]

But there is an additional reason why review is appropriate in this case. The system of confidentiality Congress has established for the State Department's Emergency Fund and other similar funds was intended to avoid any occasion for anyone other than the certifying official to look behind the certification, which Congress expressly deemed a "sufficient voucher" for the sum expended. 31 U.S.C. 107. The inquiry into the details of individual expenditures contemplated by the court of appeals' remand to determine whether other FOIA exemptions might apply therefore is itself inconsistent with the congressional judgment that the certification is a sufficient voucher. The integrity of the certification procedure should not be breached in this fashion until this Court has had an opportunity to consider whether the absolute protection Congress long intended for certificated expenditures has been displaced by the 1976 amendments to Exemption 3. The decision below not only directly affects the State Department's Emergency Fund; it also may jeopardize the integrity of certificate accounting for other expenditures.

---

[5]More recently, the Court granted certiorari in *FTC* v. *Grolier, Inc.*, No. 82-372 (June 6, 1983), even though the court of appeals had remanded for further proceedings without actually ordering the disclosure of documents. 671 F.2d 553, 557 (D.C. Cir. 1982).

For the foregoing reasons and the additional reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

SEPTEMBER 1983

DOJ-1983-09